INDEX TO APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1892

CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE, APPELLANT

v.

STEPHEN CHARLES WIESENFELD, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

United States District Court for the District of New Jersey

Nos. 268-73

STEPHEN CHARLES WIESENFELD, ETC., PLAINTIFFS

v.

SECRETARY OF HEALTH, EDUCATION, AND WELFARE, DEFENDANT

Clerk's Certificate

I, Angelo W. Locascio, Clerk of the United States District Court for the District of New Jersey, do hereby certify that the docket entries and the papers enumerated below comprise the record on appeal in the above entitled matter.

Docketed Papers

1. Complaint.
2. Summons.
3. Application for a Three-Judge Court.
4. Notice of motion.
5. Order constituting a Three-Judge Court.
6. Answer.
7. Notice to take deposition of Stephen C. Wiesenfeld.
8. Defendant's motion to dissolve Three-Judge Court.
9. Defendant's opposition to plaintiff's motion to certify class action.
10. Affidavit of Lawrence Alpern.
11. Deposition of Stephen Wiesenfeld.
12. Transcript of hearing on 6–20–73.
13. Affidavit of Stephen Charles Wiesenfeld.
14. Opinion.
15. Order enjoining Secretary of HEW and for payments to plaintiff.
16. Notice of Appeal.
17. Letter designating record on appeal.

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of said court at Trenton in said District, this 31st day of May, 1974.

ANGELO W. LOCASCIO.
Clerk.

By RICHARD W. MORRIS.
Deputy.

United States District Court for the District of New Jersey

[Caption omitted]

[Filed February 24, 1973]

Complaint Class Action—Three-Judge Court Requested

I. PRELIMINARY STATEMENT

Plaintiff, individually and on behalf of all persons similarly situated, seeks to have this court declare unconstitutional on its face and as applied, 42 U.S.C. § 402(g), a provision of the Social Security Act authorizing "mother's insurance benefits" for a widow of any age who has in her care a child of an insured in-

dividual entitled to "child's insurance benefits" under 42 U.S.C. § 402(d). The statute is challenged on the ground that limitation of the benefit to females invidiously denies men and women the equal protection of the laws safeguarded by the due process clause of the fifth amendment to the United States Constitution. Exclusion of males from this Social Security benefit entails a dual discrimination: the Social Security contributions of the female wage earner are worth less than the contributions of a similarly situated male wage earner in terms of the protection afforded the family unit; the widowed father is denied assistance granted to an identically situated widowed mother.

Plaintiff, who qualifies for benefits under 42 U.S.C. § 402(g) in all respects except that he is a father, not a mother, a widower, not a widow, seeks an injunction requiring application of 42 U.S.C. § 402(g) in a nondiscriminatory manner to parents of both sexes, and damages for benefits due to him from the date he became a widowed father who has in his care a child entitled to benefits under 42 U.S.C. § 402(d).

II. JURISDICTION

1. This action for a declaration of rights, injunctive relief and damages arises under the fifth amendment to the Constitution of the United States. Jurisdiction is conferred upon this court by 28 U.S.C. § 1331. The matter in controversy, exclusive of interest and costs, exceeds the sum of $10,000. Adjudication by a three-judge court is sought pursuant to 28 U.S.C. §§ 2282 and 2284. Declaratory relief is sought pursuant to 28 U.S.C. §§ 2201 and 2202.

III. PARTIES

A. PLAINTIFF

2. Stephen Charles Wiesenfeld, the named plaintiff, is a widower who has sole responsibility for the care of his infant son, Jason Paul Wiesenfeld. Plaintiff's wife, Paula Wiesenfeld, died giving birth to Jason Paul on June 5, 1972; for the seven years immediately preceding her death, she was employed as a school teacher and paid maximum Social Security contributions. Plaintiff is a citizen of the United States and the State of New Jersey and resides at 21 Harrison Street, Edison, New Jersey 08817.

3. Plaintiff sought Social Security benefits pursuant to 42 U.S.C. § 402(g) as a surviving spouse who has in his care a child

of an insured individual entitled to child's insurance benefits; his request for benefits as a widowed parent was denied solely on the ground of his sex.

B. CLASS ACTION

4. Plaintiff brings this action on his own behalf and, pursuant to Rule 23(b) (2), (3) of the Federal Rules of Civil Procedure, on behalf of all other persons similarly situated. The members of the class similarly situated are all widowers who have in their care a child of an insured individual entitled to child's insurance benefits under 42 U.S.C. § 402(d), and who are denied insurance benefits under 42 U.S.C. § 402(g) solely on the ground of their sex. The requirements of Rule 23 are met in that the class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class affecting the right of all members to due process and equal protection of the laws as guaranteed by the fifth amendment to the United States Constitution; the claims of the named plaintiff are typical of the claims of the class; the named plaintiff will fairly and adequately protect the interests of the class; and the party opposing the class acts or refuses to act on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

C. DEFENDANT

5. Defendant Secretary of the United States Department of Health, Education and Welfare is responsible for implementation, administration and enforcement of the Social Security Act. Defendant is sued in his official capacity and as representative of all other administrators, officers and agents charged with implementing, administering and enforcing the Social Security Act in a manner that denies to widowers who have in their care a child of insured individual entitled to child's insurance benefits, the benefits accorded to similarly situated widows.

IV. STATEMENT OF THE CLAIM

6. Plaintiff Stephen Charles Wiesenfeld is a widower who has sole responsibility for the care of his son, Jason Paul Wiesenfeld, born June 5, 1972. Paula Wiesenfeld, plaintiff's wife, died giving birth to Jason Paul Wiesenfeld on June 5, 1972.

7. Paula and Stephen Charles Wiesenfeld were married on November 15, 1970.

8. During the 1965–66 academic year Paula Wiesenfeld was employed as a teacher in Ann Arbor (Flint), Michigan. During the four academic years from 1966 to 1970 she was employed as a teacher at Highlands Jr. High School, White Plains, New York. For the two academic years prior to her death, she was employed as a teacher at Edison High School, Edison, New Jersey. At all times during the seven years immediately preceding her death, maximum contributions were deducted from her salary and paid to Social Security. The Social Security Account Number established for Paula Wiesenfeld is 079–34–7538. From the time of her marriage in November, 1970 until her death in June, 1972, Paula Wiesenfeld's earnings substantially exceeded the earnings of Stephen Charles Wiesenfeld.

9. Jason Paul Wiesenfeld, from the time of his birth, has been continuously and remains in the care of plaintiff Stephen Charles Wiesenfeld.

10. In June, 1972, following his wife's death, Stephen Charles Wiesenfeld applied for benefits at the Social Security Office in New Brunswick, New Jersey. He was informed by an official at that office that his son Jason Paul Wiesenfeld was eligible for child's insurance benefits under 42 U.S.C. § 402(d); but that benefits authorized under 42 U.S.C. § 402(g) for a widowed parent caring for a child of an insured individual entitled to child's benefits were payable to women only, not to men.

11. From June through September 1972, pursuant to 42 U.S.C. § 402(d), child's insurance benefits of $206.90 per month were received by plaintiff for his son, Jason Paul Wiesenfeld; from October, 1972 to the present, the monthly child's insurance benefits for Jason Paul Wiesenfeld have been $248.30. The benefits authorized by 42 U.S.C. § 402(g) entitle a widow identically situated to Stephen Charles Wiesenfeld to monthly payments for herself in the same amounts ($206.90 per month from June to October, 1972, $248.30 per month thereafter). Plaintiff was and continues to be denied these monthly benefits solely on the ground of his sex.

12. The exclusion of plaintiff from the benefits authorized by 42 U.S.C. § 402(g) on the sole ground that he is a father, not a mother, a widower, not a widow denies to plaintiff and all other men similarly situated due process and equal protection of the laws guaranteed by the fifth amendment to the United States Constitution.

13. Plaintiff and the members of the class he represents are suffering present irreparable injury which will continue in the future by reason of the discriminatory exclusion herein complained of; he and the members of the class he represents are and will remain in constant subjection to a constitutionally prohibited denial of due process and equal protection of the laws so long as the benefits authorized by 42 U.S.C. § 402(g) are withheld from persons solely on the ground of their sex. Pursuit of relief through administrative channels would be futile in view of the explicit limitation of 42 U.S.C. § 402(g) to females. Plaintiff is without adequate remedy at law to redress the unlawful exclusion herein complained of other than this action for a declaration of rights, an injunction and damages.

V. PRAYER FOR RELIEF

Wherefore, plaintiff respectfully prays, on behalf of himself and all other persons similarly situated, that this court:

(1) Convene a three-judge court pursuant to 28 U.S.C. §§ 2282 and 2284 to determine this controversy.

(2) Certify that this action is maintainable as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

(3) Declare that 42 U.S.C. § 402(g) is unconstitutional to the extent that men and women are not treated equally thereunder.

(4) Issue a preliminary and final injunction restraining defendant and his agents from denying benefits under 42 U.S.C. § 402(g) to plaintiff and his class solely on the ground of sex, and requiring application of 42 U.S.C. § 402(g) in a nondiscriminatory manner to parents of both sexes.

(5) Order payment to plaintiff Stephen Charles Wiesenfeld of the benefits due to him commencing June, 1972 and each month thereafter.

(6) Assess reasonable costs and attorneys fees.

(7) Grant such other and further relief as this court deems just and proper.

Respectfully submitted,

JANE Z. LIFSET.
11th Floor 570 Broad Street,
Newark, N.J.

United States District Court for the District of New Jersey

CIVIL ACTION No. 268–73

STEPHEN CHARLES WIESENFELD, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED, PLAINTIFF

v.

SECRETARY OF HEALTH, EDUCATION AND WELFARE, DEFENDANT

Complaint-Class Action—Three-Judge Court Requested

JANE Z. LIFSET,
11th Floor, 570 Broad Street,
Newark, N.J.

United States District Court for the District of New Jersey

CIVIL ACTION FILE No. 268–73

STEPHEN CHARLES WIESENFELD, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED, PLAINTIFF

v.

SECRETARY OF HEALTH, EDUCATION, AND WELFARE, DEFENDANT

Summons

To the above named Defendant:

You are hereby summoned and required to serve upon Jane Z. Lifset, Esq., plaintiff's attorney, whose address is 570 Broad Street, Newark, New Jersey 07102, an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

ANGELO W. LOCASCIO,
Clerk of Court.
MARTHA STONE,
Deputy Clerk.

FEBRUARY 27, 1973.

564 323—74——2

United States District Court for the District of New Jersey

No. Civil 268–73

STEPHEN CHARLES WIESENFELD, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED, PLAINTIFF

v.

SECRETARY OF HEALTH, EDUCATION AND WELFARE, DEFENDANT

Notice of Allocation and Assignment

Pursuant to Rule 11 of the General Rules of this Court I have allocated the above-entitled matter to *Trenton*.

Please file all pleadings and make all motions returnable there.

This Action has been assigned to Judge *Clarkson S. Fisher*.

ANGELO W. LOCASCIO,
Clerk.

By MARTHA STONE,
Deputy.

FEBRUARY 27, 1973.

The court has directed that counsel be informed that there will be strict enforcement of General Rule 15 of the local rules of this court (Completion of discovery proceedings), *and sanctions may be imposed for failure to comply with the rule and orders entered pursuant thereto: Including dismissal of the action and suppression of the defense.*

United States District Court for the District of New Jersey

[Caption omitted]

[Filed May 24, 1973]

Answer

Herbert J. Stern, United States Attorney for the District of New Jersey appearing on behalf of the defendant, by way of Answer to the Complaint, avers and says:

PRELIMINARY STATEMENT OF DEFENDANT

The following answer to plaintiff's Complaint is based on information available to the defendant at this time. The claims folder of the plaintiff is currently being reviewed and an affi-

davit or other appropriate proofs will be submitted to the Court, fully setting forth the facts as ascertained by the defendant. A motion to dismiss, or in the alternative for summary judgment, with supporting memorandum will be submitted to the Court on behalf of the defendant as soon as possible after the affidavit or other appropriate proofs setting forth the facts, as ascertained by the defendant, are available.

1. Defendant denies the allegations in plaintiff's preliminary statement.

2. Defendant denies the allegations contained in paragraph 1 of plaintiff's complaint and alleges the sole basis for jurisdiction under Title II of the Social Security Act is in section 205 (g) of the Social Security Act, 42 U.S.C. 405(g). Defendant denies jurisdiction exists under 28 U.S.C. 1331, 2282, 2284, 2201 and 2202.

3. Defendant has insufficient knowledge to answer the allegations contained in paragraphs 2 and 3 of plaintiff's complaint and therefore denies the same.

4. Defendant denies the allegations contained in paragraph 4 of plaintiff's complaint and further alleges that plaintiff is not entitled to maintain a class action in this case.

5. Defendant admits the Secretary of Health, Education, and Welfare is responsible for implementation, administration and enforcement of the Social Security Act but denies the remaining allegations of paragraph 5 of plaintiff's complaint.

6. Plaintiff has insufficient knowledge to answer the allegations contained in paragraphs 6, 7, 8 and 9 of plaintiff's complaint and therefore denies the same.

7. Defendant admits that Jason Paul Wiesenfeld was found eligible for child's insurance benefits but has insufficient knowledge to answer the remaining allegations contained in paragraph 10 of plaintiff's complaint and therefore denies the same.

8. Defendant denies plaintiff was and continues to be denied benefits solely on the basis of sex and has insufficient knowledge to answer the remaining allegations contained in paragraph 11 of plaintiff's complaint.

9. Defendant denies the allegations contained in paragraphs 12 and 13 of plaintiff's complaint.

FIRST SEPARATE DEFENSE

This Court lacks subject matter jurisdiction, for the sole basis for jurisdiction in Title II cases under the Social Security Act

is provided under section 205(g), 42 U.S.C. § 405(g). Jurisdiction of the court set out in section 205(g) is made exclusive by section 205(h) of the Act, 42 U.S.C. § 405(h) and, therefore, this Court lacks jurisdiction under 28 U.S.C. §§ 1331, 2201 or 2202.

SECOND SEPARATE DEFENSE

Plaintiff has failed to state a claim upon which relief may be granted.

Wherefore, defendant respectfully prays that this Court:

1. deny plaintiff's request for preliminary injunction,
2. deny plaintiff's request that a three-judge court be convened,
3. refuse to certify this case as a class action,
4. dismiss this action with prejudice for lack of jurisdiction and because plaintiff fails to state a claim for which relief can be granted, or in the alternative,
5. grant judgment for the defendant, and
6. grant such other relief as is just and proper.

HERBERT J. STERN,
U.S. Attorney.
By BERNARD S. DAVIS,
Assistant U.S. Attorney.

United States District Court for the District of New Jersey

STEPHEN CHARLES WIESENFELD, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED, PLAINTIFF

v.

SECRETARY OF HEALTH, EDUCATION AND WELFARE, DEFENDANT

Motion for Certification of Class Action and Summary Judgment and Supporting Papers

JANE Z. LIFSET, ESQ.,
185 Watsessing Avenue,
Bloomfield, N.J.,
Attorney for Plaintiff.

United States District Court for the District of New Jersey

[Caption omitted]

Affidavit in Support of Plaintiff's Motion for Summary Judgment

I, Stephen Charles Wiesenfeld, residing at 21 Harrison Street, Edison, New Jersey, being duly sworn upon my oath according to law depose and say:

1. I am the Plaintiff in the above-captioned action.

2. I am a widower who has sole responsibility for the care of my infant son, Jason Paul Wiesenfeld, born June 5, 1972.

3. My wife, Paula Wiesenfeld, died giving birth to Jason Paul on June 5, 1972.

4. My wife and I were married on November 15, 1970.

5. During the 1965–66 academic year, my wife Paula was employed as a teacher in Ann Arbor (Flint), Michigan. During the four years from 1966 to 1970 she was employed as a teacher at Highlands Junior High School, White Plains, New York. For the two academic years prior to her death, she was employed as a teacher at Edison High School, Edison (Middlesex), New Jersey. At all times during the seven years immediately preceding her death, maximum contributions were deducted from her salary and paid to Social Security. The Social Security Account Number established for Paula Wiesenfeld is 079–34–7538.

6. From the time of our marriage in November, 1970, until her death in June, 1972, Paula's earnings substantially exceeded mine. In 1970, Paula earned $9808.00; I earned $3100.00. In 1971, Paula earned $10686.00; I earned $2188.00. Until her death on June 5, 1972, Paula earned $6836.35; I earned $2475.00 in the year 1972.

7. Since the time of his birth, my son Jason Paul has been continuously and remains in my care.

8. In June 1972, following my wife's death, I applied for benefits for myself and my son at the Social Security Office in New Brunswick, New Jersey. An official there informed me that my son Jason Paul was eligible for child's insurance benefits under U.S.C. § 402(d); but that insurance benefits for a widowed parent having sole responsibility for a child of the insured, authorized under 42 U.S.C. § 402(g), were available for women only and that there was no provision authorizing

benefits for men having sole responsibility for a child of the insured. I was thereupon furnished with and completed an application for benefits on behalf of my son. No application for benefits for myself as a widowed parent was furnished me. I was informed at the Social Security Office that no application for benefits on my own behalf could be entertained.

9. From June through September 1972, pursuant to 42 U.S.C. § 402(d), my son Jason received child's insurance benefits of $206.90 per month; from October 1972, to the present, my son Jason has received $248.30 per month in benefits.

10. I am informed and believe that a widow in my position, having sole care for an infant of the insured, would be entitled to monthly benefits for herself in the same amounts ($206.90 per month from June to September, 1972; $248.30 per month thereafter).

11. I am informed and believe that I was denied benefits as a widowed parent solely because of my sex.

STEPHEN CHARLES WIESENFELD.

Sworn before me this 28th day of March, 1973.

CATHERINE E. CICHOWSKI,
Notary Public of New Jersey.
My Commission Expires Oct. 31, 1973.

United States District Court for the District of New Jersey

[Filed April 17, 1973]

[Caption Omitted]

Order Constituting a Three-Judge Court

Pursuant to the provisions of Section 2284, Title 28, United States Code, I designate the Honorable James Hunter, III, United States Circuit Judge, and the Honorable Lawrence A. Whipple, United States District Judge, to sit with the Honorable Clarkson S. Fisher, United States District Judge, as members of the Court for the hearing and determination of the above captioned matter.

COLLINS J. SEITZ,
Chief Judge,
Third Judicial Circuit.

DATED: April 12, 1973.

United States District Court for the District of New Jersey

[Caption Omitted]

AFFIDAVIT OF LAWRENCE ALPERN

I, Lawrence Alpern, being duly sworn, depose and say as follows:

(1) The Office of the Actuary of the Social Security Administration performs the following functions:

conducts and directs the actuarial program of the Social Security Administration;

performs actuarial and demographic research into social insurance and related programs, and makes actuarial appraisals of existing and proposed programs;

studies, for both the immediate and distant future, problems of financing program costs, estimating future workloads, and evaluating operations of the Social Security four trust funds;

develops and analyzes actuarial data for benefit estimates and valuations;

provides technical and consultative services to Congressional committees, Members of Congress, public advisory committees, and other Federal agencies; and

testifies concerning actuarial estimates before Congressional committees considering legislative changes in the Social Security programs.

(2) The Old Age Survivors and Disability Insurance program is financed by required contributions from covered workers, their employers and self-employed individuals. The program's financial operations are administered through a trust fund. A brief explanation of the operations of the fund is set out at pages 2–5, under the heading "Nature of the Trust Funds", in the *1972 Annual Report of the Trustees of the Federal Old Age and Survivors Insurance and Disability Insurance Trust Funds*, H. Rpt. No. 92–307, 92nd Cong., 2d Sess. which report is attached hereto as defendant's exhibit F. At the time the report was issued, the Old Age, Survivors and Disability Insurance system was in close actuarial balance. *Report, Supra* at 32 and 33. The Congressional intent that the program be self-supporting has been and continues to be followed. *See Com-*

mittee on Ways and Means Report on the 1949 Amendments to the Social Security Act, H. Rpt. No. 1300, 81st Cong., 1st. Sess., at page 31. Also attached, as "Defendant's exhibit E," is a table showing the annual maximum amount of taxable earnings and the annual contribution rate for Old Age Survivors Insurance (OASI), Disability Insurance (DI), and Hospital Insurance (HI).

(3) It has been determined in the Office of the Actuary that if the eligibility requirements in present law were modified so that benefits would be payable to a father of an entitled child under conditions similar to those under which benefits are payable to a mother under section 202(g) of the Act, 42 U.S.C. 402 (g), and the modification were made effective for a month in 1973, the additional benefit payments in the first full calendar year, 1974, over and above benefit payments under present law, would amount to an estimated $20 million. The long-range cost of the above change, averaged over a 75-year period, is estimated to be 0.01 percent of taxable payroll

(4) The Office of the Actuary has prepared the information listed in the tables below concerning costs of changes in the OASDI program to eliminate differences in payment of benefits now made to women but not men. Estimates of the number of persons immediately affected (i.e., persons who could receive benefits beginning with the effective month) and of benefit expenditures in the first full calendar year are shown below for several proposed changes in the OASDI program. In making these estimates, it was assumed that (1) each proposed change would become effective in 1973, so that the first full calendar year in which additional benefits would be paid is 1974; and (2) each proposal is to be taken as a single change—i.e., the estimates for each proposal are shown without considering the effect of any interaction with any of the other proposed changes:

	Number of persons immediately affected (in thousands)	Additional benefit payments in 1974 (in millions)
1. Eliminate the dependency requirement of sec. 202(c) for entitlement to husband's benefits (H.R. 1507)	250	$200
2. Eliminate the dependency requirement of sec. 202(d) for entitlement to widower's benefits (H.R. 1507)	150	125
3. Provide benefits for widowed fathers with entitled children on the same basis as benefits are provided under sec. 202(g) for widowed mothers with entitled children (H.R. 1507)	15	20
4. Provide benefits for divorced former husbands on the same basis as benefits are provided for divorced former wives	2	3
5. Provide benefits for husbands and widowers of transitional insured females on the same basis as benefits are provided for wives and widows of transitional insured males	3	2
Total, if all above changes are taken as a single package, including interaction	420	350

(5) In the 1972 Amendments to the Act, PL 92–603, Congress equalized the provisions of section 215(a) and (b) of the Act. Prior to amending § 215(a) and (b), "the method of computing benefits for men and women differed in that years up to age 65 were taken into account in determining average earnings for men, while for women only years up to age 62 were taken into account. Also, benefit eligibility was figured up to age 65 for men, but only up to age 62 for women. Under the new law, these differences are eliminated by applying to men the rules which previously applied only to women. The new provision will become effective, starting January 1973 and will be fully effective in January 1975 by reducing the age for men to 64 in 1973, to 63 in 1974 and to 62 in 1975. About 190,0000 people will be affected immediately and [an estimated] $14 million in additional benefits will be paid in 1974." *Summary of Social Security Amendments of 1972*, Joint Publication of Committee on Finance of the U.S. Senate and Committee on Ways and Means of the U.S. House of Representatives. If the 1972 Amendment were modified so that the age 62 computation provision were made applicable to beneficiaries on the rolls, as well as to future beneficiaries, and were made effective for a month in 1973, additional benefit payments in calendar year 1974—the first full calendar year—over and above benefit payments under present law would amount to an estimated $1.2 billion. The long-range cost of the proposed change, averaged over a 75-year period, is estimated to be 0.05% of taxable payroll.

(6) The long range cost to eliminate other differences between benefits for men and women would be as follows:

	Percent
Remove dependency requirement for widowers	0.06
Remove dependency requirement for husbands	.03
Provide a benefit for a former divorced husband	(1)
Provide "father's" benefit equivalent to "mother's" benefit	.01

[1] Negligible.

(7) In summary, if the modifications described in paragraphs 3 through 6 were made effective for a month in 1973, the additional benefit payments in the first full calendar year, 1974, over and above benefit payments under present law, would amount to an estimated $1½ billion. The long-range cost of the described changes, averaged over a 75-year period, is estimated to be 0.15 percent of taxable payroll.

LAWRENCE ALPERN,
Deputy Chief Actuary.

Subscribed and sworn to before me this 19th day of June 1973.

MARY A. BRENNAN,
Notary Public.
My Commission expires June 30, 1974.

Past and Future Contribution Rates and Maximum Amount of Taxable Earnings

Reflects Conference agreements on H.R.1

Calendar years	Maximum taxable amount of annual earnings	Contribution Rates (Percent of Taxable Earnings)									
		Employer and Employee, Each					Self-Employed Persons				
		OASDI			HI	Total	OASDI			HI	Total
		Total	OASI	DI			Total	OASI	DI		
1937-49...	$3,000	1.000	1.000	--	--	1.000	--	--	--	--	--
1950.....	3,000	1.500	1.500	--	--	1.500	--	--	--	--	--
1951-53...	3,600	1.500	1.500	--	--	1.500	2.250	2.2500	--	--	2.250
1954.....	3,600	2.000	2.000	--	--	2.000	3.000	3.0000	--	--	3.000
1955-56...	4,200	2.000	2.000	--	--	2.000	3.000	3.0000	--	--	3.000
1957-58...	4,200	2.250	2.000	0.250	--	2.250	3.375	3.0000	0.3750	--	3.375
1959.....	4,800	2.500	2.250	.250	--	2.500	3.750	3.3750	.3750	--	3.750
1960-61...	4,800	3.000	2.750	.250	--	3.000	4.500	4.1250	.3750	--	4.500
1962.....	4,800	3.125	2.875	.250	--	3.125	4.700	4.3250	.3750	--	4.700
1963-65...	4,800	3.625	3.375	.250	--	3.625	5.400	5.0250	.3750	--	5.400
1966.....	6,600	3.850	3.500	.350	0.350	4.200	5.800	5.2750	.5250	0.350	6.150
1967.....	6,600	3.900	3.550	.350	.500	4.400	5.900	5.3750	.5250	.500	6.400
1968.....	7,800	3.800	3.325	.475	.600	4.400	5.800	5.0875	.7125	.600	6.400
1969.....	7,800	4.200	3.725	.475	.600	4.800	6.300	5.5875	.7125	.600	6.900
1970.....	7,800	4.200	3.650	.550	.600	4.800	6.300	5.4750	.8250	.600	6.900
1971.....	7,800	4.600	4.050	.550	.600	5.200	6.900	6.0750	.8250	.600	7.500
1972.....	9,000	4.600	4.050	.550	.600	5.200	6.900	6.0750	.8250	.600	7.500
1973.....	10,800	4.850	4.300	.550	1.000	5.850	7.000	6.2050	.7950	1.000	8.000
1974.....	12,000	4.850	4.300	.550	1.000	5.850	7.000	6.2050	.7950	1.000	8.000
1975-77...	Subject to	4.850	4.300	.550	1.000	5.850	7.000	6.2050	.7950	1.000	8.000
1978-80...	automatic	4.800	4.225	.575	1.250	6.050	7.000	6.1600	.8400	1.250	8.250
1981-85...	increase	4.800	4.225	.575	1.350	6.150	7.000	6.1600	.8400	1.350	8.350
1986-2010.	after	4.800	4.225	.575	1.450	6.250	7.000	6.1600	.8400	1.450	8.450
2011+.....	1974	5.850	5.100	.750	1.450	7.300	7.000	6.1050	.8950	1.450	8.450

Defendant's Exhibit E

United States District Court, District of New Jersey

CIVIL ACTION No. 296-73

DEPOSITION OF STEPHEN WIESENFELD

[caption omitted]

Transcript of testimony taken by and before Lynn Durkin, a Notary Public and Certified Shorthand Reporter of the State of New Jersey, at the office of Herbert J. Stern, United States Attorney, Federal Building, Newark, New Jersey, on Tuesday, June 12, 1973, commencing at 9:30 a.m.

APPEARANCES

Ms. Jane Z. Lifset and *Ms. Rita L. Bender*, for the Plaintiff.
Bernard S. Davis, Esq., Assistant United States Attorney, for the Defendant.

Q. And from what period to what period were you employed by them?

A. January, 1969, through October 31, 1972. That date in January would be the last day of the month.

Q. Were you salaried there or self-employed?

Ms. LIFSET. I object to this line of questioning also. Go ahead and answer.

A. Self-employed.

Q. Could you repeat that please?

A. Polatschek. P-o-l-a-t-s-c-h-e-k.

Q. Could you repeat that please?

A. P-o-l-a-t-s-c-h-e-k.

Q. And when were you married to her, please?

A. November 15, 1970.

Q. And at the time of her death were you still married to her?

A. Yes.

Q. Could you give me the extent of your education please?

A. Bachelor of Science degree.

Ms. LIFSET. Excuse me. I object to this question also but go ahead.

A. Bachelor of Science degree in mathematics. Master of Science degree in mathematics. Master of Business Administration and Management. I have a correspondence law degree from LaSalle.

Q. JD?

A. LOB. Does not qualify me to practice law even if I take the bar exam.

Q. You stated that you have a Bachelor of Science in mathematics, a Master's degree in mathematics and what was the third degree?

A. Master of Business Administration and Management.

Q. Do you recall offhand when you attained these degrees?

A. Bachelor of Science degree was January, 1965. Master of Science degree was January, 1967. Master of Business Administration, May, 1969. The degree from La Salle was March, 1968.

Q. From what school did you get the Bachelor of Science?

A. Fairleigh Dickinson.

Q. Master of Science?

A. Fairleigh Dickinson.

Q. As well for the Master of Business?

A. Yes.

Q. How old is your son at present?

A. One year old on June 5.

Q. This coming June?

A. That makes him one year and one week today. 53 weeks.

United States District Court for the District of New Jersey

CIVIL ACTION No. 268–73

STEPHEN CHARLES WIESENFELD, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED, PLAINTIFF,

v.

SECRETARY OF HEALTH, EDUCATION, AND WELFARE, DEFENDANT.

Affidavit

I, Stephen Charles Wiesenfeld, residing at 21 Harrison Street, Edison, New Jersey, being duly sworn upon my oath according to law depose and say:

1. I am the Plaintiff in the above-captioned matter.

2. As of September 14, 1973, I was dismissed from my employment as technical representative at Cybernetics. I am presently unemployed.

3. In the past few weeks, I have been looking for employment in my field of work, consulting in project management, finance, and administration. However, due to the responsibility of car-

ing for my son Jason, I am extremely reluctant to return to work in this field, more specifically for the following reasons:

(a) Employment in consulting requires extensive travel, in both daily commuting and overnight business trips, which would substantially limit the amount of time I would have available to be with my son Jason.

(b) I have encountered severe difficulty in obtaining the services of a suitable housekeeper, to whom I could conscientiously entrust Jason's care. I have employed four housekeepers in the past year, including one for whom I financed transportation from Europe. At the present time I am not employing a housekeeper.

4. I am uncertain as to my employment future. I am considering opening a retail shop near my home, so that I could take Jason to work with me during the day and thus not require the services of a housekeeper. However, this would result in a substantial decrease in income for my family.

5. Since September 14, 1973, I have been fully qualified for the Social Security benefits authorized by 42 U.S.C. section 402(g), except for the sex requirement, and I would take full advantage of these benefits if they were available to me.

STEPHEN CHARLES WIESENFELD.

Sworn and subscribed to before me this 28th day of September, 1973.

CATHERINE E. CICHOWSKI,
Notary Public of New Jersey,
My Commission Expires Oct. 31, 1973.

Supreme Court of the United States

No. 73-1892

CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE, APPELLANT,

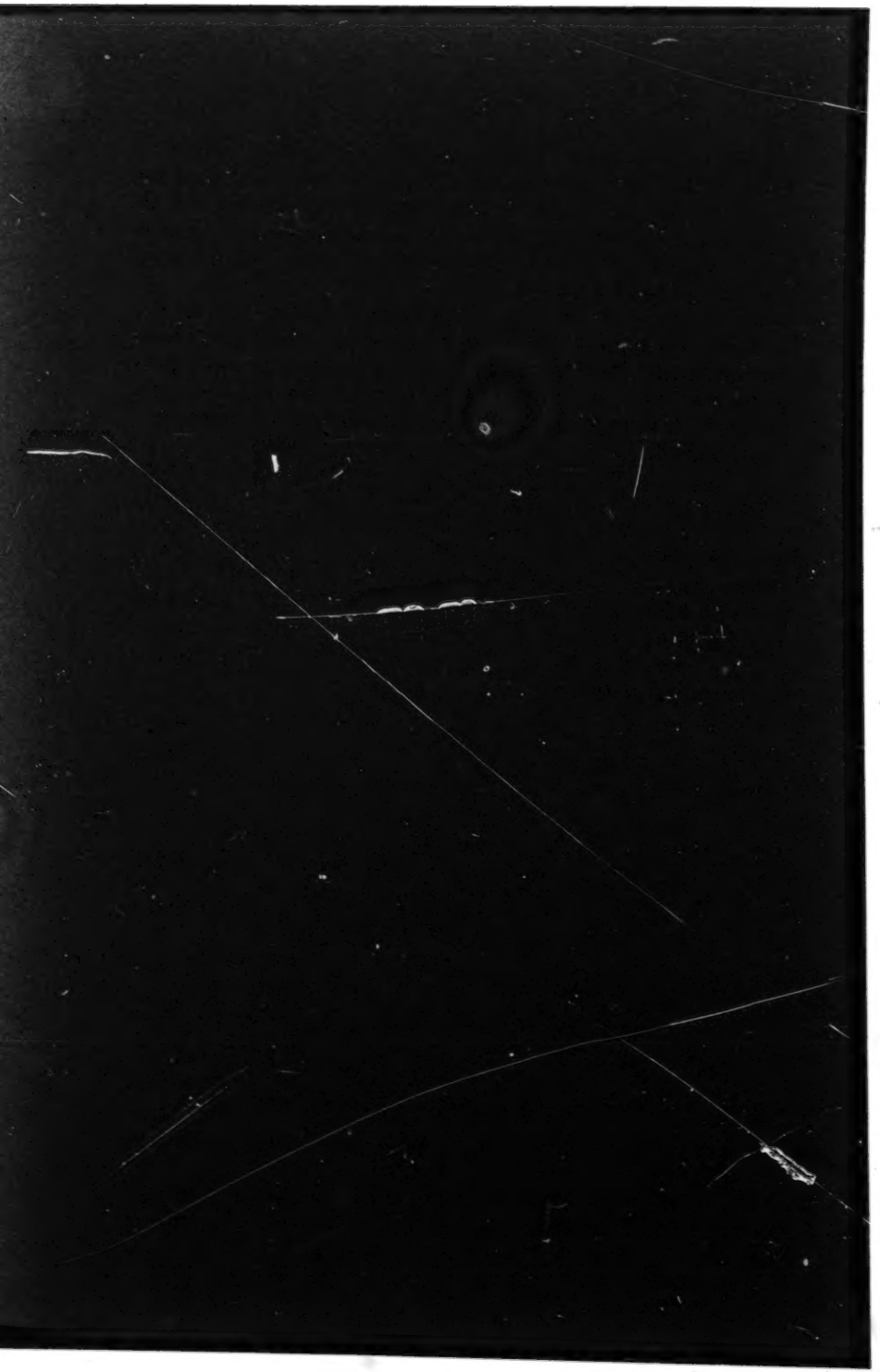
v.

STEPHEN CHARLES WIESENFELD, ETC.

Appeal from the United States District Court for the District of New Jersey.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

OCTOBER 15, 1974.



No. 73-1892

In the Supreme Court of the United States

OCTOBER TERM, 1973

CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

STEPHEN CHARLES WIESENFELD, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

JURISDICTIONAL STATEMENT

ROBERT H. BORK,
Solicitor General,

CARLA A. HILLS,
Assistant Attorney General,

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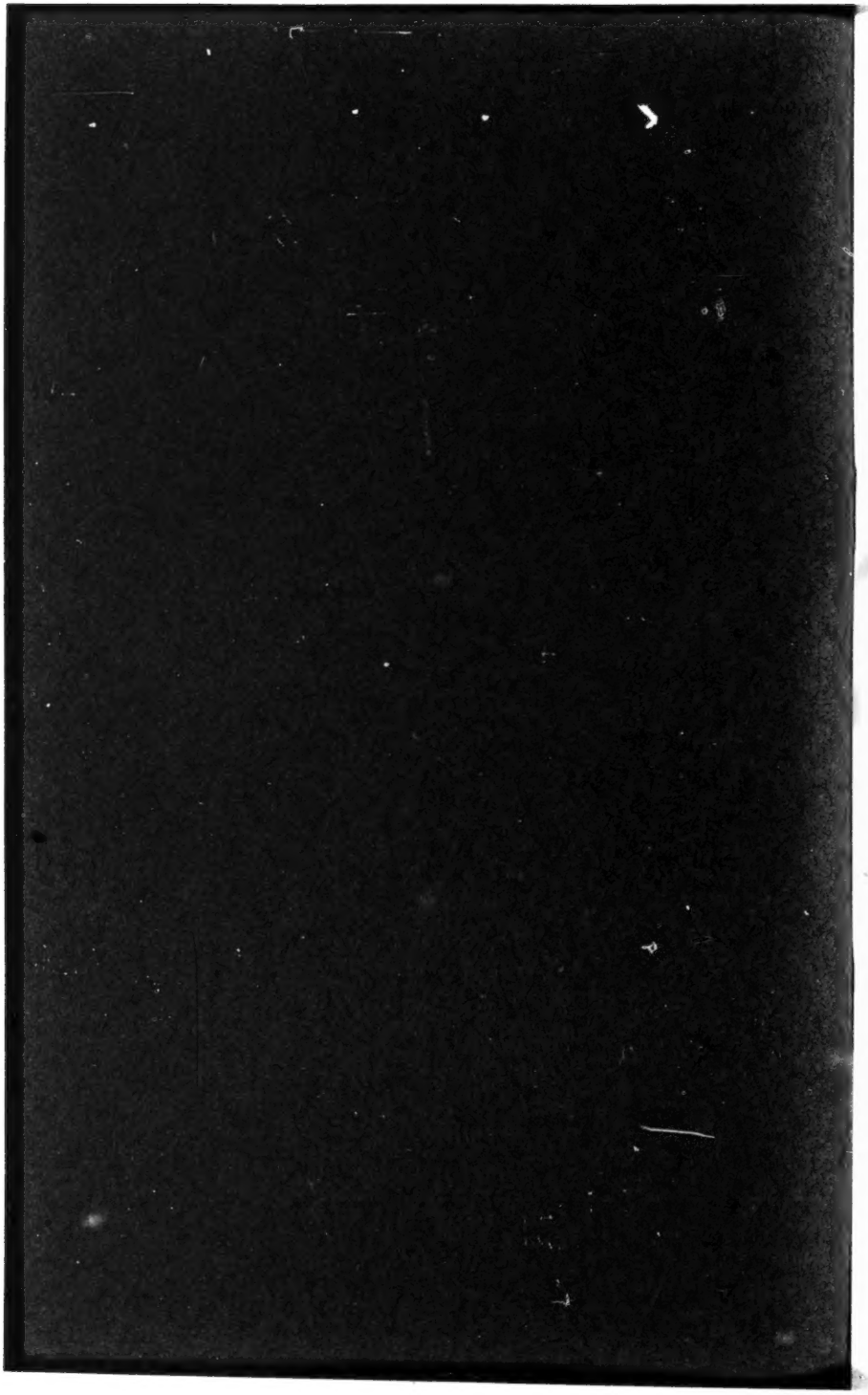

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CITATIONS

Cases:

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OCTOBER TERM, 1973

No.

CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

STEPHEN CHARLES WIESENFELD, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the three-judge district court (App. A, *infra*) is not reported.

JURISDICTION

The order of the three-judge district court (App. B, *infra*), declaring 42 U.S.C. 402(g) unconstitu-

tional, and enjoining the refusal to pay benefits thereunder to widowers, was entered on January 28, 1974. A notice of appeal to this Court (App. C, *infra*) was filed on February 25, 1974. The time for the docketing of the appeal was extended by order of Mr. Justice Brennan to June 25, 1974. The jurisdiction of this Court is conferred by 28 U.S.C. 1252 and 1253.

QUESTION PRESENTED

Whether 42 U.S.C. 402(g), which provides social security benefits to widows with minor children in their care, but not to widowers with minor children in their care, violates the Fifth Amendment to the U.S. Constitution.

STATUTE INVOLVED

42 U.S.C. 402(g) provides:

> (1) The widow and every surviving divorced mother * * * of an individual who dies a fully or currently insured individual, if such widow or surviving divorced mother—
>
> (A) is not married,
>
> (B) is not entitled to a widow's insurance benefit,
>
> (C) is not entitled to old-age insurance benefits, or is entitled to old-age insurance benefits each of which is less than three-fourths of the primary insurance amount of such individual,
>
> (D) has filed application for mother's insurance benefits, or was entitled to wife's insurance benefits on the basis of the wages and self-employment income of such individual for

the month preceding the month in which he died,

(E) at the time of filing such application has in her care a child of such individual entitled to a child's insurance benefit, * * * shall * * * be entitled to a mother's insurance benefit * * *.

(2) Such mother's insurance benefit for each month shall be equal to three-fourths of the primary insurance amount of such deceased individual.

STATEMENT

The appellee, Stephen C. Wiesenfeld, married Paula Wiesenfeld in November, 1970. Mrs. Wiesenfeld died on June 5, 1972, while giving birth to their child. (App. A, *infra*, p. 3a)

For the seven years preceding her death, Mrs. Wiesenfeld had been employed as a school teacher and deductions had been made from her salary at the maximum level established by the Social Security Administration. Throughout their marriage, both Mr. and Mrs. Wiesenfeld were employed, but Mrs. Wiesenfeld's earnings exceeded those of her husband.[1]

[1] For the two and one-half years of their marriage, Mrs. Wiesenfeld's annual earnings were approximately $10,000, while Mr. Wiesenfeld earned approximately $3,000 a year. (He earned $2,475 in 1972, the year his wife died). However, subsequent to his wife's death and his application for the benefits at issue here, Mr. Wiesenfeld was employed as a technical consultant by an engineering firm at a salary of $18,000 a year. He was discharged from this position after seven months, and was unemployed at the time of the decision of the court below. (App. A, *infra*, pp. 3a-4a).

In June, 1972, after his wife's death, Mr. Wiesenfeld applied for social security benefits at the New Brunswick, New Jersey, Social Security office. He obtained child's benefits for his son,[2] but was advised that he was not entitled to widow's insurance benefits pursuant to 42 U.S.C. 402(g), because such benefits are payable only to women (App. A, *infra*, p. 4a). Under that statute, social security benefits are provided to widows with minor children in their care based on their deceased husbands' earnings record.[3] The Act does not provide for similar payments to widowers with children in their care.

In February, 1973, Mr. Wiesenfeld commenced this action in the district court against the Secretary of Health, Education, and Welfare, contending that Section 402(g), insofar as it affords benefits solely to women, discriminates on the basis of gender, in violation of the Due Process Clause of the Fifth Amendment of the Constitution.

A three-judge court, convened pursuant to 28 U.S.C. 2282, declared Section 402(g) unconstitutional. The court first held that the statutory clas-

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[2] 42 U.S.C. 402(d) provides child's insurance benefits equal to three-fourths of the primary insurance amount of the deceased parent.

[3] The amount payable to widows with minor children in their care is set forth in the statutory formula which affords benefits equal to three-fourths of the primary insurance amount of the deceased husband (42 U.S.C. 402(g)). Benefits payable to the widows are reduced in proportion to the amount earned by the widow in excess of $2100. Thus, for every two dollars she earns above $2100, one dollar is deducted from the benefits she can receive (20 C.F.R. 404.432).

sification limiting benefits to widows satisfied the "reasonable basis" test of the Fifth Amendment. In so holding, the court observed that women continue to be unable to earn incomes comparable to men, and that the statute is, therefore, reasonably designed to rectify the effects of past and present discrimination against women (App. A, *infra*, p. 18a). The court, however, further held that statutory classifications based upon sex were "inherently suspect", and could thus be sustained only if supported by a "compelling governmental interest" (App. A, *infra*, pp. 19a-21a). The court found no such compelling interest here, because Section 402(g), while designed to relieve the effects of economic discrimination against women, in operation, invidiously "discriminates against some of the group which it is designed to protect" (App. A, *infra*, p. 20a). This is so, the court ruled, because the statute renders a female wage-earner's social security insurance of lesser value than that of a male wage-earner, since the surviving spouse of a woman wage-earner is not entitled to the benefits received by the surviving spouse of a male wage-earner. Accordingly, the court declared Section 402 (g) unconstitutional, and enjoined the Secretary from denying benefits under the statute to otherwise qualified widowers. The court's order has been stayed pending this Court's disposition of the Secretary's appeal.

THE QUESTION IS SUBSTANTIAL

This appeal presents important questions regarding the constitutionality of 42 U.S.C. 402(g), a

statutory provision calculated to offset the economic disadvantages of women.[4] The relief the district court ordered, *i.e.*, extending benefits under Section 402 (g) to men, will impose a severe burden upon the Social Security trust fund of millions of dollars each year.[5]

Review by this Court is also warranted because the decision below is in conflict with the Court's decision in *Kahn* v. *Shevin*, No. 73-78, decided April 24, 1974, sustaining the constitutionality of a Florida statute providing a property tax exemption for widows. There, as in the instant case, a widower challenged the statute on equal protection grounds, contending that the statutory restriction of benefits to women insidiously discriminated on the basis of sex. The Court upheld the classification because it was reasonably designed to reduce the "disparity between the economic capabilities of a man and a woman" (slip op. p. 2).[6] Since, as the district court

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[4] It is one of several recent cases challenging various classifications in the Social Security Act as involving denials of equal protection. See, *e.g.*, *Jimenez* v. *Weinberger*, No. 72-6609, argued April 18, 1974 (benefits to illegitimate children); *Weinberger* v. *Diaz*, No. 73-1046, certiorari granted May 13, 1974 (benefits to aliens). *Salfi* v. *Weinberger*, N.D. Calif., No. C-73 1863 ACW, decided April 16, 1974 (3 judge court), notice of direct appeal filed, May 15, 1974 (benefits to widows and stepchildren where marriage occurred shortly before death).

[5] The Social Security Administration has estimated that, for fiscal year 1974 alone, the cost of father's benefits would be $20 million.

[6] The Court noted that: "Whether from overt discrimination or from the socialization process of a male dominated

held, Section 402(g) is reasonably calculated to attain the same objective, *Kahn* is dispositive of the issue presented here, and warrants summary reversal of the decision below.

1. The court below incorrectly held that legislative distinctions based upon sex are "inherently suspect" and hence that such distinctions may be sustained only if supported by a compelling governmental interest. This Court's decision in *Kahn* v. *Shevin*, *supra*, squarely holds that the traditional "reasonable basis" test is to be used to determine the constitutionality of statutes like the one at issue here, which are designed to rectify the inferior economic status of women.[7] For as the Court stated in *Kahn*, the sole inquiry required by the Constitution is whether the challenged statute " 'rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation' *Reed* v. *Reed*, 404 U.S. 71, 76, quoting *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415" (slip op. p. 4). This, of course, is the traditional "reasonable basis" analysis, and the district court, therefore, plainly erred in requiring a compelling governmental interest to sustain the statute.

Nor can there be any doubt that Section 402(g) is supported by a reasonable basis. As the district

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culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs" (slip op. p. 2).

[7] Indeed, *Kahn* strongly indicates that the usual "reasonable basis" showing is constitutionally sufficient in all cases involving classifications based on gender (see slip op. pp. 4-5).

court held, the challenged statute is reasonably designed to offset the adverse economic situation of women by providing a widow with financial assistance to supplement or substitute for her own efforts in the marketplace.[8] This is the identical ground upon

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[8] The antecedent of Section 402(g) was the Social Security Amendments of 1939, which established monthly benefits for classes of survivors who could be presumed to be dependent on the insured worker. Social Security Amendments of 1939, H. Rep. No. 728, 76th Cong., 1st Sess., p. 11. In determining the classes of eligible beneficiaries, Congress acted upon the premise that "[u]nder a social-insurance plan the primary purpose is to pay benefits in accordance with the probable needs of the beneficiaries * * *. Social Security Amendments of 1939, House Report, *supra*, at p. 7. It concluded that the "probable need is greatest" in the case of aged widows, orphans, dependent parents over 65, and widows with minor children (*id.* at 11), and enacted, *inter alia*, Section 202(e) of the Social Security Act, 53 Stat. 1365 (August 10, 1939), the antecedent of the existing widow's benefits provision.

A second purpose in the enactment of widow's benefits was to permit widowed mothers to remain at home to care for their minor children. Final Report of the Advisory Council on Social Security 31 (1938); Report of the 1971 Advisory Council on Social Security, H. Doc. No. 92-80, 92d Cong., 1st Sess., p. 23.

The district court, stating that "the legislative history is subject to different interpretations and demonstrates that perhaps Congress had more than one purpose in creating this statute," held that the statute must be sustained if "rationally related to *some* valid public purpose" (App. A, *infra*, p. 18a). The court found such a purpose in the effort of Congress to ameliorate the economic hardships confronting widows with children. The two purposes are not entirely separable. It may be more desirable for a widow to remain home, since a widow is less likely than a widower to be able to earn enough to provide for competent substitute child care.

which this Court sustained the Florida's widows' tax exemption in *Kahn*. For here, as in *Kahn*, the statutory classification is fully justified in view of the fact that the economic difficulties "confronting the lone woman * * * exceed those facing the man," and the "disparity is likely to be exacerbated for the widow" (*Kahn*, slip op. pp. 2-3).[9]

Moreover, it follows, *a fortiori*, from the Court's decision in *Kahn* that the statutory provisions in issue here are constitutional. For unlike the Florida property tax exemption sustained in *Kahn*, which afforded benefits to all widows, Section 402(g) is more precisely drafted to further restrict the class of eligible beneficiaries to widows *with children in their care*. It requires no documentary evidence to conclude that the severe employment difficulties which confront a widow are further compounded if she is also responsible for the care of minor children. In such a case, the Constitution plainly does not forbid Congress from legislating to ameliorate, in some de-

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[9] The Court's opinion in *Kahn* amply documents this unfortunate situation (slip op. pp. 2-4), and we therefore do not reiterate those findings here. It should be pointed out, however, that the Court's observations in this respect are amply borne out by the facts of this case. As the district court's opinion demonstrates, Mrs. Wiesenfeld's salary, throughout her working life, never exceeded $10,000 a year. The appellee, however, who had obtained three advanced university degrees, in 1973 was employed as a technical consultant to an engineering firm at an annual salary of more than $18,000 a year. He was dismissed from that position after seven months, and, at last report, had opened a bicycle and hobby shop in New Jersey (N.Y. Times, December 18, 1973, p. 87, col. 4).

gree, the harsh financial condition of this limited class of citizens. There can, therefore, be no question that Congress had a reasonable basis for enacting Section 402(g); in view of *Kahn*, the Section is accordingly consistent with the Constitution.

2. The district court, however, while recognizing the validity of the legislative objective underlying Section 402(g), nonetheless struck down the statute on the ground that it discriminated against a female wage-earner by providing her family, after her decease, with lesser benefits than those received by the family of a deceased male wage-earner. But the district court was incorrect in focusing on the wage earner, whose entitlement to benefits on her own behalf is not in issue. Rather, we deal here with the allocation of public benefits among surviving beneficiaries in accordance with their probable need—a function in which Congress necessarily has the broadest possible latitude. *Richardson* v. *Belcher*, 404 U.S. 78; *Jefferson* v. *Hackney*, 406 U.S. 535.[10] Accordingly, once it is determined, as it must be here, that the statutory allocation of benefits under Section 402 (g) is founded upon a reasonable basis, the statute must be sustained.

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[10] This Court does not sit "to second-guess * * * officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients." *Dandridge* v. *Williams*, 397 U.S. 471, 487. "So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket." *Jefferson* v. *Hackney*, *supra*, 406 U.S. at 546.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted, and because this Court's decision in *Kahn* v. *Shevin*, *supra*, is dispositive of the issue presented, the judgment of the district court should be summarily reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

CARLA A. HILLS,
Assistant Attorney General.

JEWEL LAFONTANT,
Deputy Solicitor General.

STEPHEN F. EILPERIN,
ROBERT S. GREENSPAN,
Attorneys.

JUNE 1974.

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 268-73

[Original Filed Dec. 11, 1973,
Angelo W. Locascio, Clerk]

STEPHEN CHARLES WIESENFELD
individually and on behalf of all other persons
similarly situated, PLAINTIFF

vs.

SECRETARY OF HEALTH, EDUCATION AND WELFARE,
DEFENDANT

OPINION

APPEARANCES:

JANE C. LIFSET, ESQUIRE,
RUTH BADER GINSBURG, (N.Y. BAR)
For the Plaintiff
HERBERT J. STERN, ESQUIRE,
United States Attorney,
By: Bernard S. Davis,
Asst. U.S. Attorney;
T. SCOTT JOHNSTONE, ESQUIRE,
Department of Justice,
Washington, D.C.
For the Defendant

BEFORE: HUNTER, Circuit Judge
WHIPPLE and FISHER, District Judges

FISHER, District Judge

In this action plaintiff alleges that a federal statute, 42 U.S.C. Section 402(g),[1] denies him equal protection because only widows and not widowers may collect social security benefits under this section. Plaintiff seeks declaratory and injunctive relief. This three-judge court has been convened pursuant to 28 U.S.C. Section 2282 and 2284 to decide whether Section 402(g) creates sexual discrimination in violation of the equal protection component of the Due Process Clause of the Fifth Amendment.[2]

---

[1] 42 U.S.C. Section 402(g) provides:

Mother's Insurance Benefits

(1) The widow and every surviving divorced mother . . . of an individual who dies a fully or currently insured individual, if such widow or surviving divorced mother—

(A) is not married,

(B) is not entitled to a widow's insurance benefit.

(C) is not entitled to old-age insurance benefits, or is entitled to old-age insurance benefits each of which is less than three-fourths of the primary insurance amount of such individual

(D) has filed application for mother's insurance benefits, or was entitled to wife's insurance benefits on the basis of the wages and self-employment income of such individual for the month preceding the month in which he died,

(E) at the time of filing such application has in her care a child of such individual entitled to a child's insurance benefit, . . . shall . . . be entitled to a mother's insurance benefit . . . .

(2) Such mother's insurance benefit for each month shall be equal to three-fourths of the primary insurance amount of such individual . . .

[2] "(W)hile the Fifth Amendment contains no equal protection clause it does forbid discrimination that is 'so un-

Plaintiff moved for this suit to proceed as a class action pursuant to F.R.Civ.P. 23. Defendant moved to dissolve the court. Both parties have moved for summary judgment which seems appropriate because the material facts are not disputed.[3]

I

Plaintiff Stephen C. Wiesenfeld and Paula Wiesenfeld were married on November 15, 1970. Paula died in childbirth on June 5, 1972 leaving plaintiff with the responsibility for the care of his infant son, Jason.

During the seven years immediately preceding her death, Paula Wiesenfeld was employed as a school teacher in Ann Arbor, Michigan, White Plains, New York and Edison, New Jersey. At all times during her employment, maximum contributions were deducted from her salary and paid to Social Security. During their marriage, Paula Wiesenfeld's earnings exceeded that of her husband. In 1970, Paula earned $9808; Stephen earned $3100. In 1971 Paula earned $10,686; Stephen $2188. In 1972 Paula earned $6836; Stephen $2475. From January, 1969 until October 31, 1972 Stephen was employed by Eval-u-

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justifiable as to be violative of due process.'" *Schneider* v. *Rusk*, 377 U.S. 163, 168 (1964); *see also Frontiero* v. *Richardson*, 411 U.S. 677, 680 n.5 (1973); *U.S. Dept. of Agriculture* v. *Moreno*, —— U.S. ——, —— n. 5 (June 25, 1973); *Shapiro* v. *Thompson*, 394 U.S. 618, 641-642 (1969) *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

[3] Transcript of Oral Argument, June 20, 1973 at 45.

metrics, a consulting firm for computer services and industrial engineering. From February 5, 1973 until September 14, 1973 plaintiff was employed by Cyphernetics in Springfield, New Jersey as a technical consultant at a monthly salary of $1,500. On September 14, 1973 plaintiff was dismissed from this position and is unemployed at this time.[4] Plaintiff has obtained a Bachelor and a Master of Science degree in mathematics as well as a Master's degree in Business Administration.

In June, 1972 after his wife's death, plaintiff went to the Social Security Office in New Brunswick, New Jersey to apply for benefits. He obtained child's insurance benefits for his son under 42 U.S.C. Section 402(d). He was informed that he would not be entitled to any benefits under Section 402(g) because such benefits were payable only to women.[5] From June to September 1972, plaintiff received $206.90 per month on behalf of his son as child's insurance benefits. From October, 1972 to the present, these benefits have been $248.30 per month. Plaintiff did not seek any further relief from the Social Security Administrators. Indeed, as the defendant has stipu-

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[4] Affidavit of plaintiff filed on October 2, 1973 at 1, paragraph 2.

[5] Defendant has supplied an affidavit to the effect that the Social Security Officials in New Brunswick have no written records nor recollection of plaintiff's request for benefits under Section 402(g). Defendant does not now dispute plaintiff's allegations that the application for such benefits was made orally and denied orally.

lated,[6] it would have been futile for plaintiff to pursue any administrative remedy because Section 402(g) on its face granted benefits only to widows, thereby excluding men. Plaintiff then filed this suit on February 24, 1973.

II

Even though defendant has stipulated that appeal through the administrative process would be futile, which eliminates 42 U.S.C. Section 405(h)[7] as a bar to this action, the defendant contends that no jurisdictional basis has been established by plaintiff. Plaintiff suggests two jurisdictional alternatives, 28 U.S.C. Section 1331 and 42 U.S.C. Section 405(g).

Section 1331 requires an amount of at least $10,000 to be in controversy. Defendant contends that

---

[6] Transcript of Oral Argument, June 20, 1973 at 16-17.

[7] 42 U.S.C. Section 405(h) provides:

> The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under Section 41 of Title 28 to recover on any claim arising under this subchapter.

Even if the defendant had not stipulated Section 405(h) would not bar plaintiff's action. *Gainville* v. *Richardson*, 319 F.Supp. 16, 18 (D.Mass. 1970); *Williams* v. *Richardson*, 347 F.Supp. 544 (W.D.N.C. 1972); *see also Richardson* v. *Morris*, 409 U.S. 464 (1973) (per curiam); *Griffin* v. *Richardson*, 346 F.Supp. 1226, 1230 (D.Md. 1972), *aff'd*, 409 U.S. 1069 (1972).

plaintiff's claim fails to meet this jurisdictional amount. The burden is upon the plaintiff to establish by a preponderance of the evidence that his claims exceed $10,000. *Kvos, Inc.* v. *Associated Press*, 299 U.S. 269, 277-278 (1936); *Davis* v. *Shultz*, 453 F.2d 497, 501 (3d Cir. 1971); *Opelika Nursing Home, Inc.* v. *Richardson*, 448 F.2d 658, 666 (5th Cir. 1971). If it appears to a legal certainty that plaintiff cannot recover the jurisdictional amount, the case must be dismissed. Plaintiff must prove that the legal impossibility of recovering $10,000 is not so certain as to negative his good faith in asserting the claim. *Davis, supra* at 501 and cases cited therein. The amount in controversy is measured as of the time when the action was filed. *Smith* v. *Maryland Casualty Co.*, 292 F.Supp. 358, 359 (E.D.La. 1968). Events which occur subsequent to filing which reduce the amount recoverable below the statutory limit do not oust jurisdiction. *St. Paul Indemnity Co.* v. *Red Cab Company*, 303 U.S. 283, 288-290 (1939); *Wade* v. *Rogala*, 270 F.2d 280, 284 (3d Cir. 1959).

The complaint in this suit was filed on February 24, 1973. According to plaintiff's testimony at his deposition, he began employment at Cyphernetics on February 5, 1973 at a salary of $1,500 per month. Plaintiff, then, even if the statute in question permitted men to receive benefits, would have been precluded from receiving *any* benefits by virtue of his employment under the other applicable statutes regulating the amounts of payments.[5] It is also evident

[5] 42 U.S.C. Section 403(b) and (f).

that any possible benefits for the period from June 5, 1972 to February 5, 1973 would not even approach $10,000.[9]

If restricted to an analysis as of the day when this complaint was filed, defendant raises a strong argument for dismissal. Plaintiff suggests that it cannot be shown to a legal certainty that his claim is not worth $10,000 because he could have chosen to remain at home or he could have lost his job. Defendant replies that these options are mere speculation which cannot support federal question jurisdiction because a determination of the value of plaintiff's rights at the time of suit may not be based upon future or contingent events which are possible but not probable.[10]

It would be a futile act for us to dismiss the complaint for lack of jurisdiction on the ground that the possibility of plaintiff losing his job was too speculative when apparently he is now unemployed.[11] Even if this Court were to accept defendant's arguments to dismiss the complaint based upon a consideration

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[9] The amount would be $2058.00 based upon a period of eight months at $275.25 per month.

[10] *Cf. Ammex Warehouse Co.* v. *Dept. of Alcoholic Bev. Control*, 224 F.Supp. 546, 551 (S.D.Cal. 1963), *aff'd.* 378 U.S. 124 (1964); *Cardinal Sporting Goods Company* v. *Eagleton*, 213 F.Supp. 207,212 (E.D.Mo. 1963), vacated as moot, 374 U.S. 496 (1963); *Kheel* v. *Port of New York Authority*, 457 F.2d 46, 49 (2d Cir. 1972), *cert. denied*, 409 U.S. 983 (1972).

[11] Affidavit of plaintiff filed on October 2, 1973 at 1, paragraph 2.

of the probabilities on February 24, such a dismissal might not prevent plaintiff from immediately filing another suit presenting the same claims. Given these circumstances dismissal upon these grounds would be no more than an empty formality which we decline to pursue.

Jurisdiction may be established under Section 1331 if the value of the right which plaintiff seeks to protect exceeds $10,000. *See generally*, C. Wright, Law of the Federal Courts, Sec. 34 (2d ed. 1970); 1. J. Moore, Federal Practice, Para. 0.96 (2d ed. 1964). The allegation that a Congressional statute which provides certain monetary benefits to some classes of persons and not others in violation of the Fifth Amendment has been found sufficient to satisfy the requirements of Section 1331 even in the Social Security context. *Frontiero* v. *Richardson*, 411 U.S. 677 (1973); *Williams* v. *Richardson*, 347 F.Supp. 544, 548 (W.D.N.C. 1972). Both *Frontiero* and *Williams* imply that plaintiff need not wait until enough months have passed so that the total amount of the monthly benefits which might be received if plaintiff successfully demonstrates that he has been unconstitutionally excluded exceeds $10,000. *cf. White* v. *Bloomberg*, 345 F.Supp. 133, 141 (D.Md. 1972). Accordingly, we are satisfied that the amount in controversy exceeds $10,000 and jurisdiction is properly established under Section 1331.

Because we find jurisdiction under Section 1331, we need not and do not pass upon the applicability

of 42 U.S.C. Section 405(g) which plaintiff suggests as a jurisdictional alternative.[12]

Plaintiff has also moved for this suit to proceed as a class action on behalf of all widowers who have in their care a child of an insured individual entitled to federal social security child benefits and who are excluded from benefits for themselves solely because they are men. However, plaintiff admits that this request is merely a safeguard against mootness so that if, for some reason, this plaintiff were unable to continue the suit, the constitutional attack on Section 402(g) could still be litigated.[13] We find this reason as insufficient to sustain this litigation as a class action, and therefore plaintiff's motion for this matter to proceed as a class action is denied.

III

The threshold issue is what constitutional standard of review should be applied to test the validity of Section 402(g) which denies benefits on the basis of sex. The Supreme Court has utilized two equal protection tests. If a statute is based upon an "in-

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[12] In addition to finding Section 1331 jurisdiction the court also relies upon Section 405(g) for jurisdiction to review a constitutional challenge on equal protection grounds to 42 U.S.C. Secs. 403(a) and 416(h)(3) in *Williams* v. *Richardson*, 347 F.Supp. 544, 548 (W.D.N.C. 1972). In *Jimenez* v. *Richardson*, 353 F.Supp. 1356, 1358 (N.D.Ill. 1973) the court considered a constitutional attack upon sections of the Social Security Act under Section 405(g), but without any discussion of the jurisdictional issue.

[13] Transcript of Oral Argument, June 20, 1973 at 41-42.

herently suspect" classification such as race,[14] alienage,[15] or national origin,[16] or it concerns a "fundamental interest" such as the right to vote,[17] the right to appeal a criminal conviction,[18] or the right to interstate travel,[19] it is subject to strict or "close judicial scrutiny" and will be held invalid in the absence of a countervailing "compelling" governmental interest. In all other circumstances, under the "traditional" equal protection standard a legislative classification must be upheld unless it is "patently arbitrary" and bears no "rational relationship" to a legitimate governmental interest. *See, Jefferson* v. *Hackney*, 406 U.S. 535, 546 (1972); *Richardson* v. *Belcher*, 404 U.S. 78, 81 (1971); *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970); *McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961); *See generally* Developments in the Law: Equal Protection, 82 Harv. L. Rev. 1065 (1969).

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[14] *See Loving* v. *Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin* v. *Florida*, 379 U.S. 184, 191-192 (1964); *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954).

[15] *See Graham* v. *Richardson*, 403 U.S. 365, 372 (1971); *Sugarman* v. *Dougall*, 41 U.S.L.W. 5138 (U.S. June 25, 1973) (No. 71-1222); *In re Griffiths* 41 U.S.L.W. 5143 (U.S. June 25, 1973) (No. 71-1336).

[16] *See Oyama* v. *California*, 332 U.S. 633, 644-646 (1948); *Korematsu* v. *United States*, 323 U.S. 214, 216 (1944); *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943).

[17] *See Dunn* v. *Blumstein*, 405 U.S. 330, 336-337 (1972).

[18] *See Griffin* v. *Illinois*, 351 U.S. 12 (1956).

[19] *See Shapiro* v. *Thompson*, 394 U.S. 618, 629-630 (1969).

When confronted with legislative classifications based upon sex, the majority of the Supreme Court has declined to add sex to the list of inherently suspect classifications even though some courts [20] and commentators [21] have concluded otherwise. *Frontiero, supra; Reed* v. *Reed*, 404 U.S. 71 (1971).

In *Frontiero* the Supreme Court declared unconstitutional certain federal statutes which provided, solely for administrative convenience, that spouses of male members of the armed services are dependents for the purposes of obtaining increased quarters allowances and medical and dental benefits, but that spouses of female members are not considered dependents unless they are dependent for more than one-half of their support. Mr. Justice Brennan, joined by Justices Douglas, White and Marshall, concluded that because sex is an inherently suspect classification, these statutes could not be valid under "close judicial scrutiny". Mr. Justice Powell, joined by the Chief Justice and Justice Blackmun, found these statutes unconstitutional in light of *Reed*, but specifically noted that it would be inappropriate to decide whether sex is a suspect classification because the Equal Rights Amendment has been submitted to

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[20] *E.g., United States ex rel. Robinson* v. *York*, 281 F. Supp. 8, 14 (D.Conn. 1968); *Sail'er Inn, Inc.* v. *Kirby*, 5 Cal. 3d 1, 95 Cal. Rptr. 329, 339-341, 485 P.2d 529, 539-541 (1971).

[21] *E.g.*, Note, Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment? 84 Harv. L. Rev. 1499, 1507-1508 (1971); Note, 1972 Wisc. L. Rev. 626, 632-633; Note, 86 Harv. L. Rev. 568, 583-88 (1973).

the States for ratification. 411 U.S. at 691-692, Mr. Justice Stewart determined that these statutes worked an invidious discrimination in violation of constitutional principles established in *Reed*. 411 U.S. at 691.

While a decision by a divided Court is final on all issues of the case as a decision by a unanimous court [22] the reasoning employed by a plurality does not become law. *Frontiero* demonstrates that a majority of the Supreme Court has not yet classified sex as "inherently suspect".

Subsequent to *Frontiero* and *Reed*,[23] some courts and commentators have interpreted these two cases as creating an "intermediate test" for legislative discrimination based upon sex. *Eslinger* v. *Thomas*, 476 F.2d 225, 231 (4th Cir. 1972); *Wark* v. *Robbins*, 485 F.2d 1295, 1297 n. 4 (1st Cir. 1972) (dictum); *see generally* Gunther, The Supreme Court. 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court, 86 Harv. L. Rev. 1 (1972); Getman, The Emerging Constitutional Principle of Sexual Equality, The Supreme Court Review 157 (1972). Others view this "new test" as a "slightly altered" rational basis standard or as "general shift" from the traditional test to a "slightly, but percep-

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[22] *Kaku Nagano* v. *Brownwell*, 212 F.2d 262, 264 (7th Cir. 1954).

[23] In *Reed* the Supreme Court found a mandatory provision of the Idaho probate code giving preference to men over women when persons of the same entitlement class apply for appointment as an administrator of a decedent's estate violative of the Equal Protection Clause of the Fourteenth Amendment. 404 U.S. at 76-77.

tibly, more rigorous" standard. *Green* v. *Waterford Board of Education*, 473 F.2d 629, 633 (2d Cir. 1973); *Aiello* v. *Hansen*, 359 F.Supp. 792, 796 (N.D. Cal. 1973); *Brenden* v. *Independent School District 742*, 477 F.2d 1292, 1300 (8th Cir. 1973).

Apparently this "new test" developed from the language of Chief Justice Burger in *Reed* when, for a unanimous Court, he quoted *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920) that

> "(a) classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' "

404 U.S. at 76.

Royster Guano Co. can hardly be considered as a strong foundation for a "new" equal protection standard. In that case a successful attack was made upon a Virginia statute which taxed all income of local corporations derived from business done outside Virginia and business done within it, while exempting entirely the income derived from outside Virginia by local corporations which do no local business. It is evident that *Royster Guano Co.* depended upon the "traditional" equal protection standard which evolved during that era of the Supreme Court's history when governmental economic regulations were constantly challenged on equal protection grounds.

In *Reed* and *Frontiero* we do not discern a "general shift" of standards nor the establishment of a

"new intermediate" equal protection test, and we reject those cases which adopt such standards. We do, however, perceive an expression of deep concern by the Supreme Court to analyze statutory classifications based upon sex in more pragmatic terms of this everyday modern world rather than in the stereotyped generalizations of the Victorian age. At best, all that can be gleaned from *Reed* and *Frontiero* is that until the Supreme Court is faced squarely with the problem of extending *Reed* in a case where a sexual classification could be validly upheld under the "traditional" test but not under "close judicial scrutiny", we cannot be absolutely certain how statutory sex discrimination fits within equal protection doctrine. Up to this time only four members of the Court have been willing to hold that sex is a suspect classification.

The obvious reluctance of the Supreme Court to decide whether or not to categorize sex as "inherently suspect" apparently originates from an unwillingness to intrude into that area while the Equal Rights Amendment is pending ratification by the States. It also arises from the principle that if a statute violates equal protection doctrine under a lesser standard, there is no need to examine that classification by "close judicial scrutiny". *Aiello, supra* at 796; *see also Eisenstadt* v. *Baird*, 405 U.S. 438, 447 n.7. (1972). Consequently, we must first proceed to an analysis of whether Section 402(g) is rationally related to some valid public purpose.

IV

Both plaintiff and defendant raise compelling arguments in support of their positions under the "traditional" equal protection standard.

Plaintiff argues that Section 402(g) was enacted in 1939 as Section 202(e) of the Social Security Act "to provide a systematic program of protection against economic and social hazards". Plaintiff contends that these 1939 amendments were "designed to afford more adequate protection to the family as a unit". H.R.Rep. No. 728, 76th Cong., 1st Sess. 7 (1939); *see* S.Rep. No. 734, 76th Cong. 1st Sess. 8-9 (1939); Speech of Rep. Cooper, 84 Cong. Rec. 6896 (1939). Section 402(g), although paying benefits directly to a widow, was primarily intended for the protection of the children of a deceased wage earner. The widowed mother received the benefits not because she was female, but because it was assumed that she would prefer to remain at home to care for the children.[24] Because the congressional purpose of Section 402(g) was to provide for the *families* of deceased wage earners, plaintiff argues that the arbitrary congressional choice of the female as the conduit for such benefits to the family violates equal protection as did the choice by the Idaho legislature to prefer men as administrators of estates.

Plaintiff adds that not only does this arbitrary choice deny men equal protection, but it also denies

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[24] Final Report of the Advisory Council on Social Security 31 (1938).

equal protection to female wage earners such as Paula Wiesenfeld who are the principal breadwinners for their families.[25] Plaintiff argues that Section 402(g) invidiously discriminates against women wage earners when tragic events remove them from their families. In circumstances such as those in the instant case, this statute may deprive a surviving child of full time care by his only remaining natural parent. Thus, because of the manner in which Section 402(g) arbitrarily operates to discriminate against men, women wage earners and children who have lost their mothers, plaintiff concludes that this statutory provision of Congress violates equal protection under the "traditional" standard.

Defendant responds that Section 402(g) is rationally related to a valid public purpose which is to rectify the effects of past discrimination against women. Because of finite limits on the public treasury, Congress must pick and choose among competing classes of persons who shall receive benefits under social welfare programs. So long as that choice is rationally related to a valid public purpose, congressional wisdom will not be disturbed in allocating the nation's financial resources in pursuit of its social welfare goals. *cf. Dandridge* v. *Williams*, 397 U.S. 471 (1970); *Richardson* v. *Belcher*, 404 U.S. 78 (1971).

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[25] It is evident that the doctrine of *jus tertii* should not prevent plaintiff Stephen from asserting the constitutional rights of his wife Paula because no other plaintiff could present a claim similar to hers in a case ripe for adjudication under Section 402(g).

Even though Congress has clearly expressed that discrimination based upon sex shall be unlawful,[26] women have been and continue to be unable to earn incomes comparable to those of men.[27] Consequently, according to defendant, there is no constitutional defect in the decision to provide only women with benefits because it has been and continues to be more difficult for families who suffer the loss of their husband-father to replace the loss of the income which he provided. *Gruenwald* v. *Gardner*, 390 F.2d 591 (2d Cir. 1968), *cert. denied*, 393 U.S. 982 (1968); *McEvoy* v. *Weinberger*, —— F.Supp. —— (S.D.Fla. No. 72-1727 Civ. JE, August 28, 1973); compare *Shevin* v. *Kohn*, 273 So. 2d 72 (Fla. 1972), *cert. granted*, 42 U.S.L.W. 3235 (U.S. Oct. 23, 1973)

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[26] *See, e.g.*, 42 U.S.C. Secs. 2000e-2(a), (b), (c); *see generally*, Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109 (1971); *See, e.g.*, 29 U.S.C. Sec. 206(d); *see generally*, Murphy, Female Wage Discrimination: A study of the Equal Pay Act 1963-1970, 39 U.Ctn. L. Rev. 615 (1970); *see also*, H.R.J. Res. No. 208, 92d Cong., 2d Sess. (1972); 5 U.S.C. Sec. 2108, as amended, 85 Stat. 644; 5 U.S.C. Sec. 7152, as amended 85 Stat. 644; 5 U.S.C. Sec. 8341, as amended, 84 Stat. 1961; 38 U.S.C. Sec. 102(b), as amended, 86 Stat. 1092.

[27] In 1971 the median husband's earnings were $8,858 while only $3,325 for wives. Bureau of Census, Current Population Reports, Series P-60 No. 85, "Money Income in 1971 of Families and Persons in the United States", Table 31. In 1970 the median annual earnings of all female workers with taxable earnings was $2,734 while $6,133 for men. U.S. Dept. of H.E.W., Social Security Bull., Annual Statistical Supp., 1970, Table 34 at 50.

(No. 73-78). (Florida statute providing a $500 property tax exemption to widows only held not violative of equal protection). Defendant also points out that *Gruenwald* is cited with apparent approval in the opinion of Mr. Justice Brennan in *Frontiero*,[25] and therefore remains valid precedent in support of defendant's claim that because Section 402(g) is designed to rectify the effects of discrimination against women, it does not violate equal protection standards.

It is often difficult for courts to determine the specific purpose behind congressional legislation especially where, as here, the legislative history is subject to different interpretations and demonstrates that perhaps Congress had more than one purpose in creating this statute. However, under the "traditional" test, we need only find that the statute in question is rationally related to *some* valid public purpose.

When this standard is applied to Section 402(g), we find that this measure is a rational attempt by Congress to protect women and families who have lost the male head of the household. This choice by Congress is not arbitrary because it is very evident that women have been and continue to be unable to earn income equal to that of men even though Congress has clearly indicated that job discrimination on the basis of sex shall be unlawful.

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[25] 411 U.S. at 689 n.22.

V

Having determined that Section 402(g) satisfies the "traditional" equal protection standard, we must determine whether the test of "close judicial scrutiny" should be applied and whether sex should be declared as "inherently suspect". We are persuaded by the opinion of Mr. Justice Brennan in *Frontiero* that sex is "inherently suspect". When the higher standard is applied to Section 402(g), that section violates the equal protection component of the Fifth Amendment.

We agree that

> "since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility. . . .' And what differentiates sex from such non-suspect statutes as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to the ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members." 411 U.S. at 686-687.

When Section 402(g) is applied to the facts of this case and viewed under "close judicial scrutiny", even though Congress may have intended that this

section rectify the effects of past and present discrimination against women, it operates to "heap on" additional economic disadvantages to women wage earners such as Paula Wiesenfeld. *Frontiero, supra* at 689 n.22. During her employment as a teacher, maximum social security payments were deducted from her salary. Yet, upon her tragic death, her surviving spouse and child receive less social security benefits than those of a male teacher who earned the same salary and made the same social security payments.

While affirmative legislative or executive action may satisfy a compelling governmental interest to undo the past discrimination against such suspect groups as racial minorities,[29] such action cannot meet the higher equal protection standard if it discriminates against some of the group which it is designed to protect. Because Section 402(g) discriminates against women such as Paula Wiesenfeld who have successfully gained employment as well as against

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[29] *See, e.g., Contractors Ass'n. of Eastern Pa.* v. *Secretary of Labor*, 442 F.2d 159, 176-177 (3d Cir. 1971), *cert. denied*, 404 U.S. 854 (1971); *Joyce* v. *McCrane*, 320 F.Supp. 1284, 1291-1293 (D.N.J. 1970); *Carter* v. *Gallagher*, 452 F.2d 315, (8th Cir. 1971) (en banc), *cert. denied*, 406 U.S. 950 (1972); *United States* v. *Ironworkers Local 86*, 443 F.2d 544 (9th Cir. 1971), *cert. denied*, 404 U.S. 984 (1971); *United States* v. *Wood, Wire & Metal Lathers Int. U., L.U.*, 341 F.Supp. 694, 699 (S.D.N.Y. 1972), *aff'd.* 471 F.2d 408, 413 (2d Cir. 1973), *cert. denied*, 412 U.S. 939 (1973); *Southern Illinois Builders Association* v. *Ogilvie*, 471 F.2d 680, 685-686 (7th Cir. 1972); *United States* v. *Local Union No. 212*, 472 F.2d 634, 636 (6th Cir. 1973).

men and children who have lost their wives and mothers, we find this section violates the Fifth Amendment.

For these reasons we grant summary judgment for the plaintiff. Counsel, with notice, shall submit an order in accordance with this opinion declaring Section 402(g) unconstitutional insofar as it discriminates against widowers on the basis of sex, enjoining defendant from denying benefits under Section 402(g) to widowers solely on the basis of sex and directing the defendant to make payments to the plaintiff for such periods during which he would have been qualified to receive benefits but for Section 402(g) herein held unconstitutional. *Cf. Griffin* v. *Richardson*, 346 F.Supp. 1226, 1237 (D.Md. 1972), *aff'd.* 409 U.S. 1069 (1972); *Davis* v. *Richardson*, 342 F.Supp. 588, 593 (D.Conn. 1972), *aff'd.* U.S. 1069 (1972). Such order shall be stayed for ninety days to allow an appeal by either party.

The foregoing opinion shall constitute the court's findings of fact and conclusions of law under F.R. Civ.P. 52(a).

Dated: December 11, 1973.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 268-73

STEPHEN CHARLES WIESENFELD
individually and on behalf of all other persons similarly situated, PLAINTIFF

v.

SECRETARY OF HEALTH, EDUCATION AND WELFARE, DEFENDANT

ORDER

This matter having been opened to the Court by Jane Z. Lifset, counsel for plaintiff (Ruth Bader Ginsburg, Esquire of counsel) in the presence of Herbert J. Stern, United States Attorney, counsel for defendant (Bernard S. Davis, Esquire and T. Scott Johnstone, Esquire appearing) on plaintiff's motion for summary judgment, and upon defendant's motion to dismiss or in the alternative for summary judgment; and the Court having read and considered the moving and opposing papers filed by the respective parties and having heard and considered the argument of counsel, and good cause appearing;

IT IS on this 28th day of January, 1974,

ORDERED as follows:

1. That 42 U.S.C. Section 402(g) is unconstitutional insofar as it discriminates against widowers on the basis of sex.

2. That the defendant Secretary of Health, Education and Welfare be and hereby is enjoined from denying benefits under Section 402(g) to widowers solely on the basis of sex.

3. That the defendant Secretary of Health, Education and Welfare be and hereby is directed to make payments to the plaintiff Stephen Wiesenfeld for such periods during which he would have been qualified to receive benefits but for the discrimination against widowers based upon sex contained in Section 402(g) herein held unconstitutional.

IT IS FURTHER ORDERED that this Order shall be stayed for 90 days from the date of its entry to allow an appeal by either party.

/s/ Clarkson S. Fisher
CLARKSON S. FISHER
U.S.D.J.

/s/ Lawrence A. Whipple
LAWRENCE A. WHIPPLE
U.S.D.J.

/s/ James Hunter III
JAMES HUNTER III
U.S.C.J.

I hereby consent to the form of the foregoing order.

HEBERT J. STERN, ESQUIRE
United States Attorney
Attorney for Defendant

BY: /s/ Bernard S. Davis
BERNARD S. DAVIS
Assistant U.S. Attorney

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 268-73

STEPHEN CHARLES WIESENFELD
individually and on behalf of all other persons similarly situated, PLAINTIFF

v.

SECRETARY OF HEALTH, EDUCATION AND WELFARE, DEFENDANT

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA

TO: Jane Z. Lifset, Esquire
185 Watsessing Avenue
Bloomfield, New Jersey 07003

Notice is hereby given that the United States of America, the defendant in the above-named matter, hereby appeals to the Supreme Court of the United States from the final order entered on the docket herein on January 29, 1974, granting plaintiff's motion for summary judgment.

This appeal is taken pursuant to 28 U.S.C., Section 1253.

JONATHAN L. GOLDSTEIN
United States Attorney

/s/ Bernard S. Davis
By: BERNARD S. DAVIS
Assistant U.S. Attorney

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1892

CASPER W. WEINBERGER,
SECRETARY OF HEALTH, EDUCATION AND WELFARE,

Appellant,

—v.—

STEPHEN CHARLES WIESENFELD, Individually and on behalf of all other persons similarly situated,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MOTION TO AFFIRM

RUTH BADER GINSBURG
MELVIN L. WULF
JANE Z. LIFSET
American Civil Liberties Union Foundation
22 East 40th Street
New York, New York 10016

Attorneys for Appellee

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No. .....

CASPER W. WEINBERGER,
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Appellant,

—v.—

STEPHEN CHARLES WIESENFELD, Individually and on behalf of all other persons similarly situated,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellee moves to affirm the judgment of the district court.

Opinion Below

The unanimous opinion of the three-judge court is reported at 367 F. Supp. 981 (D. N.J. 1973).

Statement

This is a direct appeal from a judgment of a three-judge district court (1) declaring 42 U.S.C. § 402(g) unconstitutional insofar as it discriminates against "women . . . who have successfully gained employment as well as against men and children who have lost their wives and mothers," and (2) enjoining defendant from denying benefits under 42 U.S.C. § 402(g) to the surviving spouses of female insured individuals solely on the basis of sex. *Wiesenfeld* v. *Secretary of Health, Education and Welfare*, 367 F. Supp. 981, 991 (D. N.J. 1973).

Appellee Stephen Charles Wiesenfeld and Paula Wiesenfeld were married from November 15, 1970 until June 5, 1972, when Paula Wiesenfeld died in childbirth, leaving appellee with sole responsibility for the care of their infant son, Jason. Appellee has not since remarried.

During the seven years immediately preceding her death, Paula Wiesenfeld was employed as a school teacher. At the time of her death, she was a fully insured individual under Social Security; at all times during her employment, maximum contributions were deducted from her salary and paid to Social Security.

During their marriage, Paula Wiesenfeld's earnings exceeded those of her husband. In 1970, Paula earned $9808; Stephen earned $3100. In 1971, Paula earned $10,686; Stephen $2188. In 1972, the year of her death, Paula earned $6836; Stephen $2475.

In June 1972, after Paula Wiesenfeld's death, appellee went to the Social Security office in New Brunswick, New Jersey to apply for benefits. He obtained child insurance

benefits for his infant son under 42 U.S.C. § 402(d), but was informed he was ineligible for benefits under 42 U.S.C. § 402(g) because that section, labelled "mother's insurance benefits," specifically authorizes payments to women only. Because 42 U.S.C. § 402(g) provides a benefit for a "mother" who "has in her care a child of [an] insured individual," but no benefit for a father who has in his care a child of an insured individual, Stephen and Jason Wiesenfeld, survivors of a female wage earner, receive half the amount that would be paid to similarly situated survivors of a male wage earner.*

Appellee did not seek further relief from the Social Security administrators for, as defendant has stipulated,** pursuit of any administrative remedy would have been futile: 42 U.S.C. § 402(g) on its face grants benefits only to "mothers," thereby excluding men. Accordingly, appellee commenced this action charging that 42 U.S.C. § 402(g) discriminates on the basis of gender in violation of the fifth amendment.

Question Presented

Whether 42 U.S.C. § 402(g), which excludes a female wage earner's surviving spouse from a social security benefit designed to enable the deceased wage earner's child to be cared for personally by the surviving parent, discriminates invidiously on the basis of gender in violation of the fifth amendment to the Constitution.

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* For the period in which appellee devoted himself exclusively to the care of his infant and was not gainfully employed, he would have received an additional $275.25 per month absent the gender line in 42 U.S.C. § 402(g). See 367 F. Supp. at 985 n. 9.

** Transcript of Oral Argument, June 20, 1973 at 16-17; 367 F. Supp. at 985 nn. 5, 6.

ARGUMENT

I.

This Court's determination in *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), controlled the decision below in the instant case: employment related benefits distributed by the government must be allocated to male and female wage earners with an even hand; providing fewer benefits on the account of a female wage earner serves to perpetuate conditions that have so long kept women in a separate and unequal place in the labor force.

Frontiero declared inconsistent with the fifth amendment a fringe benefit scheme that awarded male members of the military housing allowance and medical care for their wives, regardless of dependency, but authorized benefits for female members only if they provided more than one-half of their husband's support. 42 U.S.C. § 402(g) establishes a distinction more egregious than the one declared invidious in *Frontiero*, for here, the barrier is insurmountable: under no circumstances are benefits paid to a female insured person's surviving spouse with a child of the wage earner in his care* Cf. *Jimenez* v. *Weinberger*, 42 U.S.L.W. 4948 (June 19, 1974) (declaring unconstitutional "blanket and conclusive exclusion" from social security benefits of subclass of children born out of wedlock).

As in *Frontiero*, the statutory classification in this case is unrelated to family need. Identically situated persons

* In this respect, the case is kin to *Reed* v. *Reed*, 404 U.S. 71 (1971), and *Moritz* v. *Commissioner of Internal Revenue*, 469 F.2d 466 (10th Cir. 1972), *cert. denied*, 412 U.S. 906 (1973). See Davidson, Ginsburg & Kay, Text, Cases and Materials on Sex-Based Discrimination 103, text at nn. 91-93 (West 1974).

are accorded different treatment solely on the basis of sex. Paula Wiesenfeld's social insurance is worth less to her spouse and child than the insurance of an identically situated male wage earner, just as Sharron Frontiero's efforts netted less for her family than the efforts of a male of similar rank and time in service. See Note, Sex Classifications in the Social Security Benefit Structure, 49 Ind. L.J. 181, 193 (1973).

With clear guidance provided by *Frontiero* and *Reed* v. *Reed*, 404 U.S. 71 (1971), the court below perceived the insidious impact on working women of the 42 U.S.C. § 402 (g) classification:

> [I]t operates to "heap on" additional economic disadvantages to women wage earners such as Paula Wiesenfeld . . . . During her employment as a teacher, maximum social security payments were deducted from her salary. Yet, upon her tragic death, her surviving spouse and child receive less social security benefits than those of a male teacher who earned the same salary and made the same social security payments. 367 F. Supp. at 991.

II.

The benefits sought by appellee were plainly designed to enable the child of a deceased wage earner to be cared for personally by the surviving parent. Final Report of the Advisory Council on Social Security 31 (1938). Mindful of this Court's firm instruction to it in *New Jersey Welfare Rights Organization* v. *Cahill*, 411 U.S. 619 (1973),* the

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* Summarily reversing 349 F. Supp. 491 (D. N.J. 1972). The Court struck down a limitation in New Jersey's program for assistance to families of the working poor that operated to deny

district court refused to countenance denying motherless children the opportunity for parental care afforded children who have lost their fathers.*

New Jersey Welfare Rights Organization v. *Cahill* involved a state-funded public assistance program where the "severe burden" of extending benefits was clear. By contrast, and contrary to appellant's suggestion (Jurisdictional Statement at 10 n. 10), plaintiff does not seek public assistance from general government revenue.** The Social Security system, funded by contributions from wage earners like Paula Wiesenfeld and their employers, derives much of its popular support from the idea expressed in the legislation that payments are not "welfare," but benefits due under the account of an "insured individual." In essence, 42 U.S.C. § 402 establishes two classes of "insured individuals," both subject to the same contribution rate: wage earners who are male, and therefore receive full protection for their families; wage earners who are female and therefor receive diminished family protection. Cf. Pechman, Aaron & Taussig, Social Security 81-82 (1968) (disadvan-

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benefits to illegitimate children. Significantly, the Court did not find it necessary to label the legislative classification "suspect" or the right involved "fundamental." Accord, *Jimenez* v. *Weinberger*, 42 U.S.L.W. 4948 (June 19, 1974); *U. S. Department of Agriculture* v. *Moreno*, 413 U.S. 528 (1973).

* See Railroad Retirement System Report, H.R. Doc. No. 350, 92d Cong., 2d Sess. 378 (1972) ("[I]f the society's aim is to further a socially desirable purpose, e.g., better care for growing children, it should tailor any subsidy directly to the end desired, not indirectly and unequally by helping widows with dependent children and ignoring widowers in the same plight.").

** But see *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Graham* v. *Richardson*, 403 U.S. 365 (1971); *Memorial Hospital* v. *Maricopa County*, 94 S. Ct. 1076 (1974) (public assistance extensions involving a fiscal burden hardly paralleled in the instant case).

tageous treatment of families with working wives is inconsistent with the objectives of Social Security). The instant case is a dramatic illustration of the invidiousness of that classification: 42 U.S.C. § 402(g) treats Paula Wiesenfeld as a secondary breadwinner, Stephen Wiesenfeld as an absentee parent, and the infant Jason as a child not entitled to the personal care of any parent.

III.

In *Kahn* v. *Shevin*, 94 S. Ct. 1734 (1974), this Court upheld a gender line regarded as operating solely to remedy past discrimination encountered by women in the economic sphere. In glaring contrast, it is inescapably clear that the classification embodied in 42 U.S.C. § 402(g) discriminates against women wage earners and reflects the very brand of "firmly entrenched practice"* that has operated to deny women equal opportunity and equal remuneration in the job market. Thus, when Congress genuinely determined to remedy overt discrimination against women and practices "inhospitable" to them in the economic sphere, it rejected the gender stereotype that underlies 42 U.S.C. § 402(g). In Title VII of the Civil Rights Act of 1964, as amended, and related legislation, Congress declared differentials based on that stereotype impermissible in both public and private employment. See 5 U.S.C. § 7152:

> [A] . . . law providing a benefit to a male Federal employee or his spouse or family shall be deemed to provide the same benefit to a female Federal employee or to her spouse or family.

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* *Kahn* v. *Shevin*, 94 S. Ct. at 1736.

Similarly, Equal Employment Opportunity Commission Sex Discrimination Guidelines, issued pursuant to Title VII, provide:

> It shall be an unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees; . . . . (29 C.F.R. § 1604.9(d).)

It would be bitterly ironic if a differential prohibited by federal command for the express purpose of eradicating sex discrimination in employment opportunity were permitted to stand in federal social insurance. As the court below observed, affirmative legislation or executive action is permissible to undo past discrimination, but it would be perverse to characterize legislative action as "benign" or "affirmative" where, as here, "it discriminates against some of the group which it is designed to protect." 367 F. Supp. at 991.

In sum, interpretation of *Kahn* v. *Shevin* to permit relegation of a female wage earner to second class status for family social insurance pay-out purposes (although she must pay-in on a first class basis) would collide head-on with *Reed* and *Frontiero* and would turn back the clock to the day when sharp lines between the sexes drawn by the legislature were routinely approved by the judiciary.*

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* *Goesaert* v. *Cleary*, 335 U.S. 464, 466 (1948); see Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U L. Rev. 675 (1971).

CONCLUSION

Because 42 U.S.C. § 402(g) "discriminates against women such as Paula Wiesenfeld who have successfully gained employment as well as against men and children who have lost their wives and mothers, . . . [the] section violates the Fifth Amendment." This determination of the district court, and the judgment based thereon should be summarily affirmed.

Respectfully submitted,

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June, 1974

[illegible]

[illegible], SECRETARY OF HEALTH, EDUCATION AND WELFARE, APPELLANT

v.

STEPHEN CHARLES WIESENFELD, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE APPELLANT

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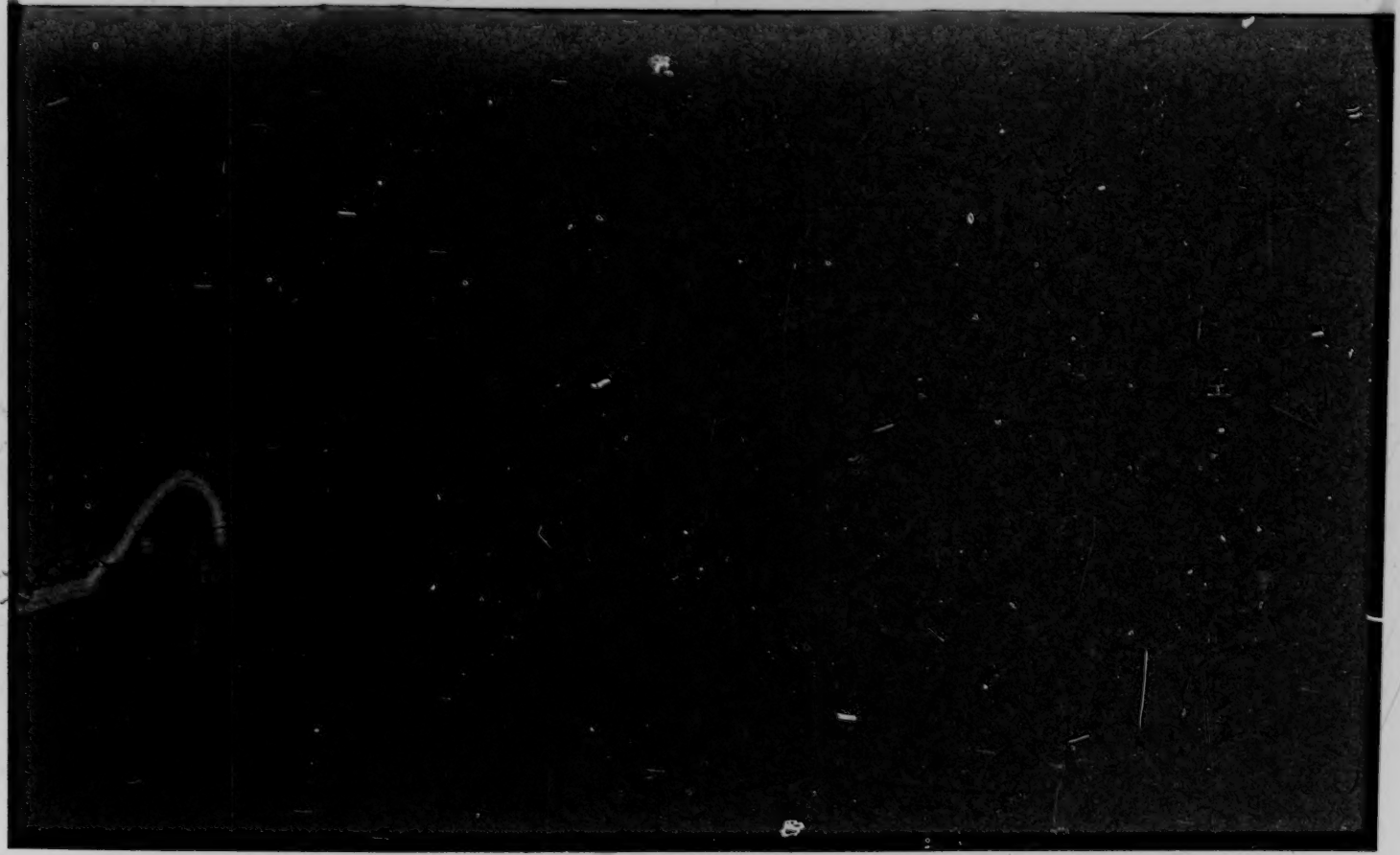

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1892

CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE, APPELLANT

v.

STEPHEN CHARLES WIESENFELD, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE APPELLANT

OPINION BELOW

The opinion of the three-judge district court (J.S. App. A) is reported at 367 F. Supp. 981.

JURISDICTION

The order of the three-judge district court (J.S. App. B) declaring 42 U.S.C. 402(g) unconstitutional,

and enjoining the refusal to pay benefits thereunder to widowers, was entered on January 28, 1974. A notice of appeal to this Court (J.S. App. C) was filed on February 25, 1974. The time for docketing the appeal was extended by order of Mr. Justice Brennan to June 25, 1974. The jurisdictional statement was filed on June 18, 1974, and probable jurisdiction was noted on October 15, 1974. The jurisdiction of this Court rests upon 28 U.S.C. 1252 and 1253.

QUESTION PRESENTED

Whether 42 U.S.C. 402(g), which provides social security benefits to widows with minor children in their care, but not to widowers with minor children in their care, denies equal protection of the laws.

STATUTE INVOLVED

42 U.S.C. 402(g) provides:

> (1) The widow and every surviving divorced mother * * * of an individual who died a fully or currently insured individual, if such widow or surviving divorced mother—
>
> (A) is not married,
>
> (B) is not entitled to a widow's insurance benefit,
>
> (C) is not entitled to old-age insurance benefits, or is entitled to old-age insurance benefits each of which is less than three-fourths of the primary insurance amount of such individual,
>
> (D) has filed application for mother's insurance benefits, or was entitled to wife's

insurance benefits on the basis of the wages and self-employment income of such individual for the month preceding the month in which he died,

(E) at the time of filing such application has in her care a child of such individual entitled to a child's insurance benefit, * * *

shall * * * be entitled to a mother's insurance benefit * * *.

(2) Such mother's insurance benefit for each month shall be equal to three-fourths of the primary insurance amount of such deceased individual.

STATEMENT

This is a direct appeal from a decision of a three-judge court invalidating, as denying equal protection of the laws, 42 U.S.C. 402(g), which provides social security benefits only to a widow with minor children in her care, based on her deceased husband's earnings record.[1] The Act does not provide for similar payments to a widower having custody of minor children.

The appellee Stephen Wiesenfeld and Paula Wiesenfeld were married from November 15, 1970, until June 5, 1972, when Paula Wiesenfeld died while giv-

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[1] The amount payable to a widow with minor children in her care is set forth in the statutory formula which affords benefits equal to three-fourths of the primary insurance amount of the deceased husband (42 U.S.C. 402(g)). Benefits payable to a widow are reduced by one dollar for every two dollars she earns annually above $2400 (20 C.F.R. 404.432, Pub. L. 93-66, 87 Stat. 153, Section 202(a)).

ing birth to their child (J.S. App. 3a). For the seven years preceding her death, Paula Wiesenfeld had been employed as a school teacher and deductions had been made from her salary at the maximum level established by the Social Security Administration. Throughout their marriage, both Paula and Stephen Wiesenfeld were employed (although he was pursuing an education during this period), but Paula Wiesenfeld's earnings exceeded those of her husband. For the two and one-half years of their marriage, Paula Wiesenfeld's annual earnings were approximately $10,000, while Stephen Wiesenfeld earned approximately $3,000 a year. Subsequent to his wife's death, however, Stephen Wiesenfeld, who holds three university degrees, was employed as a technical consultant by an engineering firm at a salary of $18,000 a year. He was dismissed from that position after seven months, and was unemployed at the time of the decision of the court below (J.S. App. 3a-4a).

In June 1972, after his wife's death, Stephen Wiesenfeld applied for widow's insurance benefits at the New Brunswick, New Jersey, Social Security office. He obtained child's insurance benefits for his son,[2] but was advised that he was not entitled to "mother's benefits," as they are termed in the Act, because 42 U.S.C. 402(g) provides such benefits only for women (J.S. App. 4a). In February 1973, he commenced this action in the district court against

[2] 42 U.S.C. 402(d) provides child's insurance benefits equal to three-fourths of the primary insurance amount of the deceased parent.

the Secretary of Health, Education and Welfare, contending that Section 402(g), insofar as it affords benefits solely to women, invidiously discriminates on the basis of gender, in violation of the Due Process Clause of the Fifth Amendment to the Constitution.

A three-judge court, convened pursuant to 28 U.S.C. 2282, declared Section 402(g) unconstitutional as written, and required that payments be made to widowers with children in their care, as well. The court first held that the statutory classification limiting benefits to widows provided equal protection under the traditional "reasonable basis" test of the Fifth Amendment (J.S. App. 18a). In so holding, the court observed that "women have been and continue to be unable to earn incomes comparable to those of men," and that the statute is, therefore, reasonably designed to rectify the effects of past and present discrimination against women (J.S. App. 17a). The court, however, further held that statutory classifications based upon sex were "inherently suspect," and could thus be sustained only if supported by a "compelling governmental interest" (J.S. App. 19a-20a). The court intimated that action favoring a formerly disfavored class such as women would serve such a compelling interest, but found that the challenged provision, while designed to relieve the effects of economic discrimination against women, actually "discriminates against some of the group which it is designed to protect" (J.S. App. 20a). This is so, the court reasoned, because the statute allegedly renders a female wage-earner's social security insurance

of lesser value than that of a male wage-earner, since her surviving spouse is not entitled to this benefit received by the surviving spouse of a male wage-earner. Accordingly, the court declared 42 U.S.C. 402 (g) unconstitutional, and enjoined the Secretary from denying benefits under the statute to otherwise qualified widowers. This Court, on October 15, 1974, noted probable jurisdiction of the Secretary's appeal.

SUMMARY OF ARGUMENT

1. The legislation challenged here must be upheld if the classification created has a rational basis in that it bears a fair relation to a legitimate object of legislation. *Geduldig* v. *Aiello*, No. 73-640, decided June 17, 1974, slip op. 10; *Dandridge* v. *Williams*, 397 U.S. 471, 485; *Richardson* v. *Belcher*, 404 U.S. 78, 84. This is true both because we deal here with the benefits conferred by a social welfare program and because classifications based on sex have been judged by that standard, whether designed specifically to favor women or not. *Flemming* v. *Nestor*, 363 U.S. 603, 611; *Kahn* v. *Shevin*, 416 U.S. 351, 356, n. 10; *Geduldig* v. *Aiello*, *supra*.

2. This legislation does have a rational basis. It is designed to confer greater benefits on widows than on widowers, in recognition of the substantially greater difficulties females, and especially widows, face in supporting themselves in the labor market. *Kahn* v. *Shevin*, *supra*, 416 U.S. at 356. This difficulty is even greater when the widow has a child in her care.

3. There also exists here a compelling state interest supporting the classification. As the court below (and even two of the dissenters in *Kahn*, *supra*, 416 U.S. at 359) noted, the state does have a compelling interest in rectifying the effects of past and present discrimination. Contrary to the district court's holding, the statute does not discriminate against female wage-earners such as Paula Wiesenfeld. A wage-earner has no particular interest in the allocation of benefits among potential recipients. *Flemming* v. *Nestor*, *supra*, 363 U.S. at 609-610. Moreover, female wage-earners receive a far greater share of social security benefits paid to them and paid on their accounts than the share of total Social Security taxes they pay. Finally, any case in which greater benefits are paid to women based on a marital relation could be cast in the form of a discrimination against the women whose spouses do not receive similar benefits. But it would be illogical to take that view where, as in Social Security, there is no necessary connection between payments and benefits, and where the benefit is in no sense a part of compensation, as was the case in *Frontiero* v. *Richardson*, 411 U.S. 677, 679, 691 n. 25.

ARGUMENT

I

THE LEGISLATIVE DECISION TO GRANT BENEFITS TO WIDOWS CARING FOR CHILDREN AND TO DENY BENEFITS TO WIDOWERS DOES NOT DENY EQUAL PROTECTION IF THE CLASSIFICATION HAS A RATIONAL BASIS

Under the traditional equal protection analysis, "a legislative classification must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate governmental interest." *Frontiero* v. *Richardson*, *supra*, 411 U.S. at 683; see also *Bolling* v. *Sharpe*, 347 U.S. 497, 499; *Schneider* v. *Rusk*, 377 U.S. 163, 168; *Shapiro* v. *Thompson*, 394 U.S. 618, 642. When, as here, we deal with statutes "[i]n the area of economics and social welfare," a legislative classification must be sustained "if any state of facts reasonably may be conceived to justify it." *Dandridge* v. *Williams*, 397 U.S. 471, 485; see also *Richardson* v. *Belcher*, 404 U.S. 78, 81, 84; *Jefferson* v. *Hackney*, 406 U.S. 535, 546; *McGowan* v. *Maryland*, 366 U.S. 420, 426.

A majority of this Court has never held that any criterion other than the "rational basis" standard is to be applied in cases dealing with distinctions based on gender. See *Frontiero* v. *Richardson*, 411 U.S. 677, 682 (opinion of four justices). Indeed, several recent cases concerning sexual distinctions specifically reaffirmed the rational basis standard. In *Geduldig* v. *Aiello*, No. 73-640, decided June 17, 1974, this Court upheld a state disability insurance scheme that

excluded from its coverage the loss of earnings caused to women by normal childbirth. Citing *Dandridge*, *Jefferson*, and *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, all cases upholding the "traditional" test, the Court stated (slip op. at 10):

> * * * Particularly with respect to social welfare programs, so long as the line drawn * * * is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point.

In *Kahn* v. *Shevin*, 416 U.S. 351, the Court upheld a tax benefit given to widows, but not to widowers, because it "rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation" (*id.* at 355). The Court noted specifically that "[g]ender has never been rejected as an impermissible classification in all instances," citing cases relying on the rational basis standard (*id.* at 356 n. 10). See also *Reed* v. *Reed*, 404 U.S. 71, 76.

Indeed, by sustaining the statute in *Kahn* solely on the ground that it satisfies the traditional reasonable basis test, the Court has strongly indicated that classifications based upon gender are not subject to the strict, compelling interest, standard of review. Gender classifications do not constitute a "suspect" category warranting strict judicial scrutiny. Although sex, like race and national origin, is a biological characteristic, generally visible and immutable, and to that extent shares the attributes of those suspect categories, the analogy terminates at this point.

For differences based upon gender, as the present case illustrates, are too often the subject of legitimate governmental legislation to warrant characterization as a "suspect" category. This Court, and the courts of appeals, have recently sustained a variety of statutes distinguishing on the basis of gender, and touching on quite varied areas of life.[a]

We submit, therefore, that gender-based classifications are not to be evaluated under the compelling in-

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[a] *Kahn* v. *Shevin*, *supra* (property taxes); *Williams* v. *McNair*, 401 U.S. 951, affirming 316 F. Supp. 134 (D. S.C.) (separate college branches for men and women); *Gruenwald* v. *Gardner*, *supra*, 390 F.2d 591 (C.A. 2), certiorari denied *sub nom. Gruenwald* v. *Cohen*, 393 U.S. 982 (social security benefits); *Kohr* v. *Weinberger*, 378 F. Supp. 1299 (E.D. Pa.) (same); *Robinson* v. *Board of Regents of Eastern Kentucky Univ.*, 475 F. 2d 707 (C.A. 6), certiorari denied, 416 U.S. 982 (college curfew requirements); *Miskunas* v. *Union Carbide Corp.*, 399 F. 2d 847 (C.A. 7), certiorari denied, 393 U.S. 1066 (consortium cause of action limited to men); *Lily* v. *Lily* (Sup. Ct. Va.), October 23, 1973, appeal dismissed for want of a substantial federal question, 416 U.S. 976 (alimony and lawyer's fees in divorce awardable only to wife); *Stuart* v. *Stuart*, (Cal. Ct. App.), September 26, 1973, appeal dismissed for want of a substantial federal question, 416 U.S. 976 (preference to women in custody of young children after divorce). At the same time, several statutes have been determined to be unreasonable and have been held unconstitutional. *Frontiero* v. *Richardson*, *supra*; *Reed* v. *Reed*, *supra*; *Eslinger* v. *Thomas*, 476 F. 2d 225 (C.A. 4) (invalidating State resolution barring females from serving as Senate pages); *Brenden* v. *Independent School District 742*, 477 F. 2d 1292 (C.A. 8) (invalidating State rule preventing girls from participating in high school noncontact sports with boys); *Healy* v. *Edwards*, 363 F. Supp. 1110 (E.D. La.), probable jurisdiction noted, 415 U.S. 911, argued October 16, 1974 (invalidating State statute exempting from jury service women who do not voluntarily register for it).

terest test. Where sex differences are manifestly irrelevant to the particular objective sought to be attained by the legislature, this Court struck down the statute. See, *e.g.*, *Stanley* v. *Illinois*, 405 U.S. 645 (fathers, but not mothers, of illegitimate children denied a hearing before children removed for unfitness); *Reed* v. *Reed*, 404 U.S. 71 (men always preferred to women as executors). On the other hand, where those differences do pertain to the legislative objective, the reasonable basis test has been applied because it permits the implementation of legitimate social and economic policies (*Kahn* v. *Shevin*, *supra*; *Williams* v. *McNair*, *supra*).

II

THE CHALLENGED CLASSIFICATION HAS A RATIONAL BASIS AND IS REASONABLY RELATED TO A PROPER LEGISLATIVE OBJECTIVE

Under the rational basis test, the challenged statute is constitutional. As the court below recognized, Section 402(g) "is a rational attempt by Congress to protect women and families who have lost the male head of the household" (J.S. App. 18a). The statutory limitation of benefits to women is "not arbitrary because it is very evident that women have been and continue to be unable to earn income equal to that of men even though Congress has clearly indicated that job discrimination on the basis of sex shall be unlawful" (*ibid.*). The challenged classification, therefore, serves the legitimate, compassionate governmental objective of ameliorating the harsh economic

circumstances of women with families who have been deprived of the support of a husband.[4]

The legislative history of the Social Security Act, while not entirely clear with respect to the objective of Section 402(g), reflects the longstanding concern of Congress with the plight of beneficiaries, such as widows, who survive the insured worker.[5] The original Social Security Act of 1935 provided no benefits to the families of deceased insured workers, except a lump sum death benefit to the estate of the insured (49 Stat. 623, Sec. 203(a)).

In 1939, however, Congress substantially expanded the statute to establish monthly benefits for certain classes of survivors who could generally be presumed to be dependent on the insured worker. Social Security Act Amendments of 1939, H. Rep. No. 728, 76th Cong., 1st Sess., p. 11. In determining the classes of eligible beneficiaries, Congress acted upon the premise that "[u]nder a social-insurance plan the primary purpose is to pay benefits *in accordance with the*

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[4] This Court's opinion in *Kahn* v. *Shevin*, *supra*, 416 U.S. at 353-354 and nn. 4-7, amply documents the unfortunate economic situation confronting women who seek employment, and we therefore do not reiterate those findings here. See n.9, *infra*.

[5] Of course, when determining the constitutionality of legislation under the traditional equal protection test, a statute will be sustained if a legitimate governmental objective can be conceived. *Dandridge* v. *Williams*, *supra*, 397 U.S. at 485; *McGowan* v. *Maryland*, *supra*, 366 U.S. at 426. Since the governmental interest posited by the district court clearly is a legitimate one, no further demonstration of legislative intent is required to uphold it.

probable needs of the beneficiaries * * *" (*id.* at 7; emphasis added). In accordance with that criterion, Congress concluded that the "probable need" was greatest in the case of aged widows, orphans, dependent parents over 65, and widows with minor children (*id.* at 11), and enacted, *inter alia*, Section 202(e) of the Social Security Act, 53 Stat. 1365, the predecessor of the existing widow's benefits provision.[6] The provision for benefits for widows with families has been substantially retained in subsequent revisions of the Act since 1939.[7] Congress has consistently rejected, however, numerous attempts to provide analogous benefits to men. At least twelve bills were introduced in the last seven years alone which would have extended benefits to surviving fathers with young children. On each occasion, the proposed legislation failed to pass.[8] This consistent

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[6] In 1950, the title of this provision was changed from "widow's insurance benefits" to "mother's insurance benefits," to reflect more accurately that benefits are payable only to widows with children in their care. S. Rep. No. 1669, 81st Cong., 2d Sess., p. 65.

[7] The coverage of the statute has gradually been enlarged to include, *e.g.*, benefits to the divorced wife of a deceased insured who was dependent upon the latter (Pub. L. 81-734, Section 101(a), 64 Stat. 485), and later to eliminate the dependency requirement for surviving divorced wives (Pub. L. 92-603, Section 114(c) 86 Stat. 1348).

[8] 90th Congress, H.R. 9715, 1st Sess.; 91st Congress, H.R. 250, H.R. 841, H.R. 14277, 1st Sess.; 92d Congress, H.R. 3289, H.R. 7537, 1st Sess., H.R. 15528, H.R. 16036, H.R. 16101, 2d Sess.; 93d Congress, H.R. 1570, H.R. 5670, H.R. 10499, 1st Sess.

pattern of legislation reflects the considered judgment of Congress that the "probable need" for financial assistance is greater in the case of a widow, with young children to maintain, than in the case of similarly situated males.[9] For this reason, Congress has provided benefits to this class of survivors, as it has to other groups such as dependent parents over 65 and aged widows, who cannot fairly be expected to replace, by their own efforts in the job market, the loss of support occasioned by the death of a family wage-earner.

Since Section 402(g) is reasonably designed to offset the adverse economic situation of women by providing a widow with financial assistance to supplement or substitute for her own efforts in the marketplace, the challenged classification is valid because it has a reasonable basis. Indeed, this Court, in *Kahn* v. *Shevin*, *supra*, recently confirmed the constitutionality of legislation designed to ameliorate the inferior economic status of women. There, the Court upheld a

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[9] The gross disparity noted above (n. 4, *supra*) also exists in one-parent families. In 1972, the median income of female heads of household who were employed full-time the year around was $6,508, while for male household heads with no wife present, it was $9,917. This probably understates the earnings disparity, as females would be far more likely to have non-earnings income such as welfare, pensions, annuities or Social Security benefits. In addition, only 33% of the female heads of household were thus fully employed, as opposed to 56% of the comparably situated males. *Money Income in 1972 of Families and Persons in the United States*, Bureau of the Census, Current Population Reports, Series P-60, No. 90, Table 46 (1973).

Florida statute providing a property tax exemption only for widows against an equal protection challenge by a widower who contended that the statutory restriction of benefits to women invidiously discriminated on the basis of sex. The Court upheld the classification because it was reasonably designed to reduce the "disparity between the economic capabilities of a man and a woman" (416 U.S. at 352). In so holding, the Court noted that financial assistance limited to women is constitutionally permissible in appropriate cases, because (*id.* at 353):

> whether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs. [*id.* at 353]

These observations are equally apposite here, where the challenged statute is premised upon the same economic factors considered relevant in *Kahn*, and is intended to fulfill the same purpose.[10] Since the stat-

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[10] The Court of Appeals for the Second Circuit, in *Gruenwald* v. *Gardner*, 390 F. 2d 591, certiorari denied *sub nom. Gruenwald* v. *Cohen*, 393 U.S. 932, sustained on this very ground the constitutional validity of 42 U.S.C. 415(b), which afforded favored treatment to women wage-earners in computing social security benefits based on their earnings records. The court held that the statute was rationally based, and free of invidious discrimination, notwithstanding that the classification was expressly based upon gender. In upholding the statute, the court stated (390 F. 2d at 592):

> There is here a reasonable relationship between the objective sought by the classification, which is to reduce the disparity between the economic and physical capabilities of a man and a woman—and the means used to achieve

ute upheld in *Kahn* had precisely the same object and effect as Section 402(g), that decision is controlling here. For in this case, as in *Kahn*, the statutory classification limiting benefits to widows alone is fully justified because the economic difficulties "confronting the lone woman * * * exceed those facing the man," and that "[t]he disparity is likely to be exacerbated for the widow" (416 U.S. at 354).

Indeed, this statute lacks the features of overinclusion which caused two justices to dissent from the Court's holding in *Kahn*. See 416 U.S. at 360. For unlike the Florida property tax exemption sustained in *Kahn*, which afforded benefits to all widows, Section 402(g) is more precisely drafted to further restrict the class of eligible beneficiaries to widows *with children in their care*. One may easily conclude that the severe employment difficulties which confront a widow are further compounded if she is also responsible for the care of minor children (see n. 9, *supra*). In such a case, the Constitution does not forbid Congress from legislating to ameliorate, in some degree, the harsh financial condition of only this limited class of citizens. See *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489.[11]

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that objective in affording to women more favorable benefit computations.

See also *Kohr* v. *Weinberger*, 378 F. Supp. 1299 (E.D. Pa.).

[11] As noted above (n. 1), benefits are further reduced by one-half of earnings in excess of $2400 per year. Accordingly, unlike the statute involved in *Kahn*, Section 402(g) further relates the receipt of benefits to actual need. We also

Appellee has contended that this statute denies equal protection no less than the statute in *Frontiero*, *supra*, because in each case the spouse of a female was denied some benefit that might be available to the spouse of a male (Mot. Aff. 4). This analysis ignores the fact that in *Frontiero*, the challenged requirement explicitly diminished the compensation available to female officers as compared to male officers. It is for just this reason that similar distinctions in benefits have been forbidden under the Equal Pay Act of 1963, 29 U.S.C. 206(d) and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2. Social Security benefits, on the other hand, are not compensation. They are allocated to a significant extent in relation to probable need. And, as we show in

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note that the point at which benefits would cease in this case, should benefits be paid, is $8360 ($2980 in annual benefits x 2 + the initial $2400), which is between the median earnings for men and women. See n. 9, *supra*; *Kahn*, *supra*, 416 U.S. at 353, nn. 4 and 5. Thus, the bulk of male workers would receive no benefits in any event, because of their earnings, while the bulk of female workers would require such benefits despite their labors.

Of course, while Congress could also have afforded benefits to men, and applied the earnings deductions to them as well, there is no constitutional requirement that Congress adopt this course. For this Court does not sit "to second-guess * * * officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients." *Dandridge* v. *Williams*, 397 U.S. 471, 487. "So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket." *Jefferson* v. *Hackney*, *supra*, 406 U.S. at 546.

greater detail below, at pp. 19-20, any measure favorable to females based in part on a past marital relation (*e.g.*, the tax exemption in *Kahn*) could be cast in the form of a discrimination against females whose spouses cannot obtain similar benefits. This strained analysis should not obscure the overwhelmingly favorable effect on women of the challenged requirement.

III

THE CHALLENGED STATUTE SERVES A COMPELLING GOVERNMENT INTEREST AND DOES NOT DISCRIMINATE AGAINST FEMALE WAGE-EARNERS

The district court, contrary to our submission in Point I, *supra*, found that sex was a "suspect" category and that the statute must serve a "compelling" government interest to survive. It stated, however, that such an interest might be found in measures designed to remedy past discrimination, even when involving that most "suspect" of classes, race (J.S. App. 20a). It held, however, that this statute did not so operate, because it discriminated against a woman wage-earner because her beneficiaries "receive less social security benefits than those of a male" similarly situated (*ibid.*). We now show that the lower court was correct in holding that a statute benefiting females served a compelling state interest, but erred in determining that the statute should be overturned for discriminating against female wage-earners.

There is general agreement that a program providing favorable treatment to certain groups to rectify past discrimination may serve a compelling state interest. See J.S. App. 20a, n. 29 and cases there cited concerning employment programs favoring minority groups. Mot. Aff. 8. In those cases where some members of this Court have indicated that a compelling interest standard should be applied to gender classifications, they have also indicated that classifications favorable to females meet that standard. In *Frontiero, supra*, 411 U.S. at 689 n. 22, the four justices supporting the compelling interest standard specifically noted that the statute there challenged was not "in any sense designed to rectify the effects of past discrimination against women," citing *Gruenwald* v. *Gardner, supra* n. 3. *Gruenwald* upheld another portion of the Social Security Act according women favored treatment in benefit computation.

Even two of the three dissenters in *Kahn* (Justices Brennan and Marshall) agreed that a statute giving disproportionate benefits to females served a compelling interest. They stated: "the statute serves a compelling governmental interest by 'cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden,'" which is exactly the purpose and effect of the statute here. 416 U.S. at 358.[12] We therefore

[12] Those justices nevertheless dissented because the statute was not drawn narrowly enough to exclude benefits to affluent widows. The provisions regarding earnings set forth

submit that the challenged statute does not unconstitutionally discriminate against men by providing greater benefits to women.

Nor is the interest less compelling because of its alleged discrimination against women wage-earners (Mot. Aff. 4-5, 8). Appellee's argument that this statute so discriminates is no sounder than an argument that in *Kahn* v. *Shevin*, a female Florida taxpayer is getting less for her taxes because she knows that if she dies her widower will not receive a tax exemption, while a similarly situated male would have the comfort of knowing that his widow would be so aided. We submit that such an analysis was not accepted there, and is equally unconvincing here for several reasons.

The district court was incorrect in focusing on the wage-earner, whose entitlement to benefits on her own account is not in issue. Rather, we deal here with the allocation of public benefits among surviving beneficiaries in accordance with their probable need —a function in which Congress necessarily has the broadest possible latitude. *Richardson* v. *Belcher*, *supra*; *Jefferson* v. *Hackney*, *supra*. The plenary authority of Congress to allocate benefits without regard to what might be the wage-earner's wishes is further supported by the fact that "[e]ach worker's

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supra, nn. 1, 11, almost entirely meet this objection in the instant case. Although a widow with wealth from sources other than earnings would still receive payments, this focus only on earnings rather than total income pervades the entire Act.

benefits * * * are not dependent on the degree to which he was called upon to support the system by taxation." *Flemming* v. *Nestor*, 363 U.S. 603, 609-610. Far from being a private insurance program, in which benefits are correlated with contributions (*ibid.*):

> The Social Security system may be accurately described as a form of social insurance, enacted pursuant to Congress' power to "spend money in aid of the 'general welfare,'" * * * whereby persons gainfully employed, and those who employ them, are taxed to permit the payment of benefits to the retired and disabled, and their dependents. * * * It is apparent that the noncontractual interest of an employee covered by the Act cannot be soundly analogized to that of the holder of an annuity, whose right to benefits is bottomed on his contractual premium payments.

Accordingly, since the amount of benefits on account of a wage-earner, male or female, are determined, not solely by the wage-earner's contributions, but by the legislative judgment of Congress regarding the probable economic needs of the beneficiaries, the wage-earner cannot legitimately complain when Congress employs those criteria in allocating benefits.

Moreover, the Social Security system as a whole provides proportionately greater benefits to women than to men. See *Geduldig* v. *Aiello*, *supra*, slip op. at 11 and n. 21. We are informed by the Office of the Chief Actuary, Social Security Administration, that 28% of all Social Security taxes are

presently paid on account of female workers. However, 34% of all benefit payments are made based on the accounts of female workers; 44% of all payments made directly to workers (as opposed to dependents or relatives) are made to females; and 51% of all social security payments are made to females. Under appellee's theory, presumably these figures would all be evidence of discrimination against male workers, as their contributions bring them and their dependents proportionately smaller benefits. We submit that the situation cannot be so viewed. Where a payment is made as a social welfare measure to the recipient, rather than as an item of compensation to a spouse (as in *Frontiero*), it is proper to consider the payment as it affects the recipient, rather than the conjectural effect on the non-recipient spouse.

As an illustration, consider the effect of "rectifying" this alleged discrimination against women by extending the instant "mother's benefits" to fathers. An affidavit below indicated that the cost of this measure would be approximately $20 million (and over $300 million if other very closely analogous provisions were extended) (R. 13). As the system is required to remain in actuarial balance, this money must be financed either by a rise in taxes or a decrease in benefits. It is very difficult to fathom how an increased benefit paid exclusively to males, yet financed either out of taxes, 28% of which are paid by females, or benefits, 34-54% of which are paid to females or on the accounts of females, can be an elimi-

nation of anti-female discrimination. Yet that is the import of the district court's analysis.

We submit that even under the compelling interest standard, the challenged benefit is exactly the type of measure designed to rectify economic inequalities permitted by that standard. See *Frontiero*, *supra*, 411 U.S. at 689, n. 22; *Kahn* v. *Shevin*, *supra*, 416 U.S. at 358-360 (Marshall and Brennan, JJ., dissenting).

CONCLUSION

It is therefore respectfully submitted that the judgment of the district court should be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1892

CASPAR W. WEINBERGER, Secretary of Health, Education and Welfare,

Appellant,

—v.—

STEPHEN CHARLES WIESENFELD, Individually and on behalf of all other persons similarly situated,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR APPELLEE

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Opinion Below

The unanimous opinion of the United States District Court for the District of New Jersey, sitting as a three-judge court, is reported at 367 F. Supp. 981 (1973).

Jurisdiction

On January 28, 1974, the United States District Court for the District of New Jersey, sitting as a three-judge court, entered the judgment which is the subject of this appeal. Notice of Appeal to the Supreme Court of the

United States was filed on February 25, 1974. Time for docketing the appeal was extended by order of Mr. Justice Brennan to June 25, 1974. The Jurisdictional Statement was filed on June 18, 1974, and Appellee's Motion to Affirm was filed on June 25, 1974. Probable jurisdiction was noted on October 15, 1974. Jurisdiction to review this decision on appeal is conferred by 28 U.S.C. §§1252 and 1253.

Statute Involved

42 U.S.C. §402(g) provides:

> (1) The widow and every surviving divorced mother * * * of an individual who died a fully or currently insured individual, if such widow or surviving divorced mother—
>
> (A) is not married,
>
> (B) is not entitled to a widow's insurance benefit,
>
> (C) is not entitled to old-age insurance benefits, or is entitled to old-age insurance benefits each of which is less than three-fourths of the primary insurance amount of such individual,
>
> (D) has filed application for mother's insurance benefits, or was entitled to wife's insurance benefits on the basis of the wages and self-employment income of such individual for the month preceding the month in which he died,
>
> (E) at the time of filing such application has in her care a child of such individual entitled to a child's insurance benefit, * * * shall * * * be entitled to a mother's insurance benefit * * *.

(2) Such mother's insurance benefit for each month shall be equal to three-fourths of the primary insurance amount of such deceased individual.

Question Presented

Whether 42 U.S.C. §402(g), which excludes a female wage earner's surviving spouse from a Social Security benefit designed to enable the deceased wage earner's child to be cared for personally by the surviving parent, discriminates invidiously on the basis of gender in violation of the fifth amendment to the Constitution.

Statement of the Case

This action was commenced on February 24, 1973 to declare unconstitutional and enjoin the enforcement of 42 U.S.C. §402(g) insofar as it discriminates on the basis of gender.

Appellee Stephen Charles Wiesenfeld and Paula Wiesenfeld were married from November 15, 1970 until June 5, 1972, when Paula Wiesenfeld died in childbirth, leaving appellee with sole responsibility for the care of their infant son, Jason Paul. Appellee has not since remarried.

During the seven years immediately preceding her death, Paula Wiesenfeld was employed as a school teacher. At the time of her death, she was a fully insured individual under Social Security; at all times during her employment, maximum contributions were deducted from her salary and paid to Social Security.

During their marriage, Paula Wiesenfeld's earnings exceeded those of her husband. In 1970, Paula earned $9808;

Stephen earned $3100. In 1971, Paula earned $10,686; Stephen $2188. In 1972, the year of her death, Paula earned $6836; Stephen $2475.

Stephen Wiesenfeld received his last and highest degree, a Master of Business Administration, in May 1969, eighteen months prior to his marriage. At no time during his marriage was Stephen Wiesenfeld "pursuing an education." See Deposition of Stephen Wiesenfeld, June 12, 1973, at 6 (Appendix at 18-19).[1]

In June 1972, after Paula Wiesenfeld's death, appellee went to the Social Security office in New Brunswick, New Jersey to apply for benefits. He obtained child insurance benefits for his infant son under 42 U.S.C. §402(d), but was informed he was ineligible for benefits under 42 U.S.C. §402(g) because that section, labelled "Mother's insurance benefits," specifically authorizes payments to women only. Because 42 U.S.C. §402(g) provides a benefit for a "mother" who "has in her care a child of [an insured] individual," but no benefit for a father who has in his care a child of an insured individual, Stephen and Jason Paul Wiesenfeld, survivors of a female wage earner, received half the amount that would have been paid to similarly situated survivors of a male wage earner.[2]

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[1] Brief for the Appellant at 4, attributing the disparity in earnings between appellee and his wife to appellee's "pursuit of an education," is wholly without support in the Record and flatly contrary to fact.

[2] For the period in which appellee devoted himself almost exclusively to the care of his infant and was not engaged in substantial gainful employment, he would have received an additional $275.25 per month absent the gender line in 42 U.S.C. §402(g). See 367 F. Supp. at 985 n. 9. This period included the eight months immediately following his wife's death, as well as the months following his short-term employment in 1973. See Affidavit of Stephen Wiesenfeld, September 28, 1973 (Appendix at 19-20).

Appellee did not seek further relief from the Social Security administrators for, as defendant has stipulated,[3] pursuit of any administrative remedy would have been futile: 42 U.S.C. §402(g) on its face grants benefits only to "mothers," thereby excluding men.

In a unanimous decision rendered December 11, 1973, judgment entered thereon January 28, 1974, the three-judge district court (1) declared 42 U.S.C. §402(g) unconstitutional insofar as it discriminates against "women . . . who have successfully gained employment as well as against men and children who have lost their wives and mothers," and (2) enjoined defendant from denying benefits under 42 U.S.C. §402(g) to the surviving spouse of a female insured individual solely on the basis of sex.

Summary of Argument

I.

The 42 U.S.C. §402(g) "child in care" Social Security benefit, furnished to the surviving spouse of a male insured individual, but not to the surviving spouse of a female insured individual, reflects the familiar stereotype that, throughout this Nation's history, has operated to devalue women's efforts in the economic sector. The female insured individual, who is treated equally for Social Security contribution purposes, is ranked as a secondary breadwinner for purposes of determining family benefits due under her account. Just as the female insured individual's status as a breadwinner is denigrated, so the parental status of her surviving spouse is discounted. For the sole

[3] Transcript of Oral Argument, June 20, 1973, at 16-17; 367 F. Supp. at 985 nn. 5, 6.

reason that appellee is a father, not a mother, he is denied benefits that would permit him to attend personally to the care of his infant son, a child who has no other parent to provide that care.

The child, who supplies the *raison d'être* for the benefit in question, is the person ultimately disadvantaged by the 42 U.S.C. §402(g) gender line. A social insurance benefit, which is designed to facilitate close parent-child association, is not constitutionally allocated when it includes children with dead fathers, but excludes children with dead mothers.

II.

Exclusion of a deceased female worker's spouse from "child in care" benefits is not fairly and substantially related to the legislative purpose to provide for the families of deceased workers. Facilitating parental care for growing children, unquestionably an appropriate legislative purpose, may be advanced by a benefit tied to family need and the preference of the parent. However, gross gender classification may not be used as a proxy for a need or parental preference criterion. Legislative provision for a "mother's benefit," but no father's benefit, cannot do service for functional classification when the effect is invidious discrimination against the families of working women.

III.

In enacting a "child in care" benefit, Congress used as its model and, for convenience, treated as universal, the one-earner family composed of breadwinning husband and child tending wife. Increasing female participation in the paid labor force has made it apparent that this rigidly

stereotyped vision of man's work and woman's place lacks correspondence with reality for millions of American families.

IV.

Exclusion of the spouse of a working woman from social insurance benefits accorded the spouse of a working man does not operate to remedy the effects of past economic discrimination against women. On the contrary, the exclusion disadvantages working women, for their Social Security payments do not provide the same level of benefits for their families as do the payments of similarly positioned men. This tangible economic harm to working women and their families cannot be rationalized as part of a "benign" or "remedial" plan. Rather, the scheme "heaps on" an additional disadvantage, exacerbating, not alleviating, past discrimination encountered by women in the labor market.

V.

Fiscal economy may not be achieved by invidious exclusions of persons guaranteed by the Constitution the equal protection of the laws. It is invidious discrimination to provide less protection for the families of female wage earners than for the families of male wage earners, to deny to widowed fathers the same opportunity to attend to child rearing that is accorded widowed mothers, and to deny to a child whose mother has died the opportunity to be cared for personally by its sole surviving parent.

VI.

Benefits distributed by the federal government to gainfully-employed individuals and their families must be allocated with an even hand and without resort to classification based on gender per se. Decisions of this Court and lower federal courts establish that classification based on gender per se is impermissible in employment-related regulation. Nor may a federal social insurance scheme, which is designed to benefit children of deceased wage earners, incorporate a "blanket and conclusive exclusion" of a class of children without regard to their need or the life situation of their parents. While special deference may be due to state policies on issues of local concern, such as state taxation and zoning, latitude for underinclusive classification is less broad when a wholly federal and employment-related benefit program is in question.

Every branch of the federal government has identified as invidious discrimination against gainfully-employed women provision of benefits for the wives (or widows) and families of male employees when the same benefits are not made available for the husbands (or widowers) and families of female employees. As underscored by multiple federal efforts to counter practices that deny women equal rights and opportunities in the work force, including appellant's own published guidelines, the 42 U.S.C. §402(g) gender-based differential is at odds with the concept of nondiscrimination and contrary to any reasoned definition of affirmative action.

VII.

Upon determining that the gender line drawn by 42 U.S.C. §402(g) is unconstitutional, the Court, consistent with the dominant congressional purpose, should declare the benefit equally applicable to widowed mothers and fathers. Nothing in the text of the "child in care" benefit provision or its legislative history indicates that unequal treatment of men and women is a considered part of the congressional plan for protection of families of deceased insured individuals. Unquestionably, the dominant congressional purpose was to accord to the children of deceased workers the opportunity to receive the personal care of a parent. Withdrawing the benefit from mothers would conflict with this primary statutory objective. The legislative history of Social Security, the express remedial preference of Congress in all of its recent measures eliminating gender-based differentials, and well-established judicial precedent confirm that extension of "child in care" benefits to fathers is the remedy that must be accorded if the legislature's overriding purpose is to be preserved rather than destroyed.

ARGUMENT

I.

The gender-based criterion established by 42 U.S.C. §402(g) discriminates invidiously against gainfully-employed women insured under Social Security as well as against their surviving spouses and children; this discrimination constitutes a denial of the equal protection of the laws guaranteed by the due process clause of the fifth amendment.

A. *The statute discriminates against gainfully-employed women insured under Social Security.*

Paula Wiesenfeld, appellee's deceased wife, was a fully insured individual under Social Security. She contributed to Social Security on precisely the same basis as an insured male individual. Upon her death, however, her family received fewer benefits than those paid to similarly situated families of male breadwinners. The sole reason for the differential was Paula Wiesenfeld's sex. As a breadwinning woman, she was treated equally for Social Security contribution purposes, but unequally for the purpose of determining family benefits due under her account. Without regard to her family's need or life situation, 42 U.S.C. §402 (g) ranks her as a secondary breadwinner, an individual whose employment is less valuable to, and supportive of, the family than the employment of the family's man.

In short, 42 U.S.C. §402(g) reflects the familiar stereotype that has so long operated to deny women's efforts in the economic sector recognition and monetary benefits equal to those accorded men. Indeed, the statutory pattern en-

countered here is a prototype. A more recent, less extreme example of the genre was declared unconstitutional by this Court's 8-1 judgment in *Frontiero* v. *Richardson*, 411 U.S. 677 (1973).[4] Significantly, on other days appellant, together with virtually every branch and department of the federal government, has identified the pattern in question as one that discriminates invidiously against gainfully-employed women. See pp. 38-44 *infra*. And compare Brief for the Appellant at 17 (asserting family Social Security benefits are not analogous to a housing allowance for the Frontieros, or medical and dental care for Joseph Frontiero), with Brief for the Appellees at 8, *Frontiero* v. *Richardson*, *supra* (Solicitor General's footnote explanation that the *Frontiero* differential was "similar" to Social Security family benefit differentials).

B. *The statute discriminates against surviving spouses of women workers insured under Social Security.*

Appellee Stephen Wiesenfeld is a father, not a mother. For that sole reason, 42 U.S.C. §402(g) denies him benefits that would permit him to attend personally to the care of his infant son—a child who has no other parent to provide that care. Identically situated parents, like identically situated breadwinners, are treated differently under 42 U.S.C. §402(g) solely on the basis of gender. No woman in appellee's situation can be denied the benefits in question, no man so situated can obtain them.

Just as Paula Wiesenfeld's status as a breadwinner is devalued, so Stephen Wiesenfeld's parental status is deni-

[4] In *Frontiero*, a husband qualified for benefits if wife supplied more than half his support. In the case at bar, under no circumstances may benefits be accorded a male surviving parent.

grated, for 42 U.S.C. §402(g) recognizes the mother, to the exclusion of the father, as the nurturing parent. She may stay home with her child, he may not stay home with his. Implicit in this differential is the assumption that it is less important for a child to be cared for by its sole surviving parent when that parent is male rather than female. In light of this Court's decisions in *Stanley* v. *Illinois,* 405 U.S. 645 (1972), and *Frontiero* v. *Richardson, supra,* the double-edged discrimination involved in the instant case cannot withstand constitutional review.

C. *The statute discriminates against children of deceased women workers insured under Social Security.*

Jason Paul Wiesenfeld, child of a deceased mother who qualified as a fully insured individual under Social Security, is the person ultimately disadvantaged by the statutory scheme. A child whose insured father dies may receive the personal care of its surviving parent, but the child whose insured mother dies must get along without the personal care of either parent.

Plainly, the child supplies the *raison d'être* for 42 U.S.C. §402(g). The benefit is inextricably bound to parental care for minor children. No benefit exists for the young widow absent a child of the insured individual in her care. As the court below observed, the statute "was primarily intended for the protection of the children of a deceased wage earner." 367 F. Supp. at 989. Focusing on this dominant purpose, the pivotal question becomes: Is a social insurance benefit, which is designed to facilitate close parent-child association, constitutionally allocated when it includes children with dead fathers, but excludes children with dead mothers?

Throughout his presentation, appellant sedulously avoids this critical issue. Understandably so, for the irrationality, inequality and injustice of the 42 U.S.C. §402(g) gender line, which operates to deny to Jason Paul Wiesenfeld the opportunity to receive the personal care of his sole surviving parent, should be manifest. Given the pattern of discrimination conspicuous in 42 U.S.C. §402(g), the differential founders on constitutional shoals clearly marked in this Court's precedent. Not only does it collide with *Stanley* v. *Illinois, supra,* and *Frontiero* v. *Richardson, supra,* but it conflicts as sharply with *Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164, 175 (1972),[5] *New Jersey Welfare Rights Organization* v. *Cahill,* 411 U.S. 619 (1973), and *Jimenez* v. *Weinberger,* 418 U.S. ——, 94 S. Ct. 2496 (1974), decisions striking legislative lines that impact adversely upon hapless children.

II.

The congressional purpose, to provide for the families of deceased workers, is not fairly and substantially served by the 42 U.S.C. §402(g) gender-based criterion.

To survive constitutional review, gender-based classifications, at a minimum, must be "reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Reed* v. *Reed,* 404 U.S. 71, 76 (1971), quoting from *F. S. Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415

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[5] Accord, *Davis* v. *Richardson,* 342 F. Supp. 588 (D. Conn.) (three-judge court), *aff'd mem.,* 409 U.S. 1069 (1972); *Griffin* v. *Richardson,* 346 F. Supp. 1226 (D. Md.) (three-judge court), *aff'd mem.,* 409 U.S. 1069 (1972).

(1920).[6] It is appellee's position that 42 U.S.C. §402(g) plainly fails to meet this standard. *A fortiori,* 42 U.S.C. §402(g) could not meet a heightened review standard, responding more precisely to the root cause of law-sanctioned gender lines that impact adversely upon women who seek to pursue economic or political activity on the same basis as men.[7]

A. *No legitimate governmental interest is fostered by denying to families of deceased female workers insured under Social Security benefits equal to those accorded families of deceased male workers.*

Exclusion of a deceased female worker's spouse from benefits under 42 U.S.C. §402(g), the "child in care" Social Security provision, is not fairly and substantially related

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[6] The due process clause of the fifth amendment, setting a standard to which federal legislation must conform, guarantees to every person security from arbitrary treatment and the equal protection of the laws. In this regard, the fifth amendment imposes the same obligation upon the federal government as the fourteenth amendment does upon the states. See *Johnson* v. *Robison,* 415 U.S. 361, 364-65 n. 4 (1974); *United States Dep't of Agriculture* v. *Moreno,* 413 U.S. 528 (1973).

[7] See Brief for Appellant, *Reed* v. *Reed, supra;* Jurisdictional Statement, Brief of American Civil Liberties Union, Amicus Curiae and Joint Reply Brief of Appellants and American Civil Liberties Union, *Frontiero* v. *Richardson, supra;* Gunther, The Supreme Court 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 33-36 (1972); Note, 88 Harv. L. Rev. 129 (1974). The *Reed* and *Frontiero* Briefs cited above discuss in detail the prime generator of gender-based classifications in the law: the notion that social roles are pre-ordained by sex, so that lump treatment of individuals has been regarded as permissible in this area long after such treatment was recognized as fundamentally unfair where race or national origin is the birth characteristic in question. For full elaboration of the "suspect" quality of classifications based on gender per se, see Joint Reply Brief, *supra,* and Davidson, Ginsburg & Kay, Sex-Based Discrimination 100-102 (1974).

to the dominant aim of Congress—to provide for the families of deceased workers. On the contrary, the 42 U.S.C. §402(g) gross gender line mandates differential treatment of identically situated families solely on the basis of a criterion that bears no necessary relationship to a child's need or a parent's nurturing function. The explanation for the differential is not obscure: Congress assumed that a widowed mother, but never a widowed father, would prefer child rearing to substantial economic endeavor. See 367 F. Supp. at 989. The fundamental unfairness of excluding motherless families from the "child in care" benefit was identified by the Railroad Retirement Commission in its analysis of 42 U.S.C. §402(g)'s counterpart in the Railroad Retirement Act (45 U.S.C. §228e(b)):

> Statistically speaking, there are, of course, significant differences by sex in the roles played in our society. For example, far more women than men are primarily involved in raising minor children. But if the society's aim is to further a socially-desirable purpose, e.g., better care for growing children, it should tailor any subsidy directly to the end desired, not indirectly and unequally by helping widows with dependent children and ignoring widowers in the same plight. In this example, it is the economic and functional capability of the surviving breadwinner to care for children which counts; the sex of the surviving parent is incidental.

Railroad Retirement Commission Report, H.R. Doc. No. 92-350, 92d Cong., 2d Sess. 378 (1972); cf. Pechman, Aaron & Taussig, Social Security 81-82 (1968) (disadvantageous treatment of families with working wives is inconsistent with the objectives of Social Security).

In short, the sharp line between the sexes drawn by 42 U.S.C. §402(g) plainly does not represent a fair, rational and functional approach to the allocation of family benefits. As in *Reed* v. *Reed, supra,* and *Frontiero* v. *Richardson, supra,* the legislation here at issue impermissibly distinguishes between men and women without regard to individual or family need, ability, preference or life situation. The gender label employed, however convenient, cannot do service for functional classification when the effect is invidious discrimination against the families of women workers.

B. *The gender line drawn by Congress rests on a gross, stereotypic view of the economic and parental roles of men and women.*

In the case at bar, as in *Reed* v. *Reed,* 404 U.S. 71 (1971), and *Frontiero* v. *Richardson,* 411 U.S. 677 (1973), upholding the gender-based criterion would require approval of gross sex-role stereotyping as a permissible basis for legislative distinction. In providing a "mother's benefit," but no father's benefit, Congress assumed a division of parental responsibility along gender lines: breadwinner was synonymous with father, child tenderer with mother. Increasing female participation in the paid labor force has placed in clear focus the invidious quality of this rigid sex-role delineation.

As originally enacted in 1935,[8] the Social Security Act contained no provisions for monthly benefits to members of a deceased insured individual's family. By 1939, Congress concluded that family economic security required a more comprehensive program. Among the packet of amend-

[8] Act of August 14, 1935, ch. 531, Title II, §202, 49 Stat. 623.

ments added that year[9] was the "child in care mother's benefit." 42 U.S.C. §402(g), enacted as §202(e) of the Social Security Act.

As the court below pointed out, 42 U.S.C. §402(g), "although paying benefits directly to a widow, was primarily intended for the protection of the children of a deceased wage earner. The widowed mother received the benefits not because she was female, but because it was assumed that she would prefer to remain at home to care for the children." 367 F. Supp. at 989. "Such payments are intended as supplements to the orphans' benefits with the purpose of enabling the widow to remain at home and care for the children." Final Report of the Advisory Council on Social Security 31 (1938).[10]

Omission of widowers with children of a deceased wage earner in their care was not the product of deliberation. Rather, in 1939, legislators were accustomed to coupling widows and orphans, mothers and children; they did not conceive of men in a childcare role. A member of the House explained that the program was to provide "a family basis" of coverage, to make up for the loss of pay and wages that previously had been brought into the family by the insured individual. The Representative spoke of the loss only in terms of the father's or husband's income; he apparently did not contemplate the possibility that a mother or wife might have made important contributions to the family income, much less that she might be, as Paula Wiesenfeld

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[9] Act of August 10, 1939, ch. 666, Title II, §201, 53 Stat. 1362; see H.R. Rep. No. 728, 76th Cong., 1st Sess. (1939); S. Rep. No. 734, 76th Cong., 1st Sess. (1939).

[10] No benefits were provided for young widows without children, nor are such benefits furnished today.

was, the family's principal breadwinner. 84 Cong. Rec. 6896 (1939) (remarks of Rep. Cooper).[11]

In short, the stereotype of woman at home, man at work was pervasive in the 1939 family benefit amendments. Congress used as its model and, for convenience, treated as universal the one-earner family composed of independent breadwinning husband and dependent, homemaking wife.[12]

In 1950, amendments were introduced to further enhance the security of survivors of insured individuals.[13] Contributions of the working wife to family income were accorded partial recognition.[14] Although the 1950 amendments represent a first significant step toward equalizing benefits for the families of insured men and women, Congress remained oblivious to the possibility that a deceased female breadwin-

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[11] Brief for the Appellant at 4 reveals the tenacity of one-eyed sex-role thinking well into the 1970's. To explain why appellee earned less than his wife, appellant assumes a non-existent fact—that appellee must have been "pursuing an education during that period." But the reality is that appellee, who married in 1970, completed his education in 1969. See p. 4 and n. 1, *supra*.

[12] Propositions such as "wives are typically dependent" (*Frontiero*), "men typically have more business experience than women" (*Reed*), "most unwed fathers do not want custody of their children" (*Stanley* v. *Illinois*) concededly may be reasonable as highly generalized conclusions. But the issue in all those cases, as in this one, is the reasonableness of treating the substantial population of individuals and families who do not match the gross generalization as if they did, and of using in the particular context a gender stereotype in lieu of functional description.

[13] Act of August 28, 1950, ch. 809, Title I, §202, 64 Stat. 483.

[14] Husbands' and widowers' benefits were introduced for elderly men, not themselves insured under Social Security, who received at least half their support from their wives, and receipt of orphans' benefits for the children of deceased female workers were facilitated. Act of August 28, 1950, ch. 809, Title I, §202(c), (d), (f), 64 Stat. 483-85.

ner's spouse might assume a child-rearing role. The coverage of 42 U.S.C. §402(g) was enlarged, but only to include the divorced wife of a deceased male insured individual. Further enlargement of the category mothers entitled to "child in care" benefits occurred in 1958 and again in 1972. See S. Rep. No. 2388, 85th Cong., 2d Sess. (1958); S. Rep. No. 92-1230, 92d Cong., 2d Sess. 33 (1972).

In contrast to the pattern assumed by Congress in 1939, and not reconsidered by the national legislature in the context of Social Security since that time,[15] women's dramatically increasing participation in the paid labor force is a prime fact of contemporary life. In 1940, women comprised less than 30% of gainfully-employed persons. By the start of the 1970's, they comprised nearly 43%. U.S. Bureau of Labor Statistics, Dep't of Labor, Employment and Earn-

[15] No effort to provide a "child in care" benefit for fathers occurred until 1967. In that year, Representative Martha Griffiths sought extension of the 42 U.S.C. §402(g) "mothers" benefit to include similarly situated fathers. H.R. 9715, 90th Cong., 2d Sess. Since 1967, several similar bills have been introduced. See Brief for the Appellant at 13. However, to date, no bill eliminating the gender line from the "child in care" benefit has been reported out of the House Ways and Means Committee. Thus, contrary to appellant's references to "considered judgment" and "consistently rejected" (Brief for the Appellant at 13-14), the issue remains unexplored by Congress through committee report or floor debate.

Understandably absent from appellant's recitation is acknowledgment of the sponsorship of the bills he lists. Principal house proponents have been Representatives Martha Griffiths and Bella Abzug, leading advocates of equal opportunity for women.

It should be noted that a catalogue of bills to correct the discrimination challenged in *Frontiero* had been introduced before and during the pendency of that action. See Brief for the Appellees at 12 n. 8, *Frontiero* v. *Richardson*, 411 U.S. 677 (1973) (Solicitor General's reference to six bills introduced, but not passed, that would have eliminated the differentials challenged by Sharron and Joseph Frontiero). But rumblings in Congress were not considered an excuse for this Court's avoidance of the obligation to decide what the equal protection mandate requires.

ings 34-35 (May 1971). By 1974, close to 35 million women, including over 52% of all women between the ages of 18-64, were in the labor force. Close to 60% of gainfully-employed women were married and living with their husbands. Over 42% of women workers worked full-time the year round. U.S. Women's Bureau, Dep't of Labor, Why Women Work (rev. 1973) and Women Workers Today (rev. 1974). See also Hayghe, Labor Force Activity of Married Women, U.S. Dep't of Labor, Monthly Labor Review (April 1973). Moreover, despite the discrimination against women workers still characteristic of the labor market, many married women earn more than their husbands. The Census Bureau reports that in 1970, wives earned more than husbands in 3.2 million or 7.4% of American families. See New York Times, March 19, 1973, at 40, col. 1. The 1970 Census also reveals that women accounted for two-thirds of the increase in total employment in the 1960's and for half or more of the gain in certain jobs, ranging from bookkeeping to bartending. See Occupation by Industry, PC-7C (1970).

Candid recognition that the rigid sex-role allocation reflected in 42 U.S.C. §402(g) does not correspond with reality for millions of families in the United States appears in a recent Social Security Administration Research Report:

> The concept that a man is responsible for the support of his wife and children led to the creation of a broad structure of social security family protection. At the same time, the steady growth of labor-force participation by women, particularly married women, has been reflected in a phenomenal growth in the number of women entitled to benefits on the basis of their own earnings records. Complaints that the OASDHI system discriminates against women have proliferated as a result of this growth.

Hoskins & Bixby, Social Security Administration Research Report No. 42, Women and Social Security: Law and Policy in Five Countries 94-95 (1973).

In stark contrast to current awareness in most public forums of the invidiousness of regulation wedded to gross sex-role stereotypes, see pp. 38-44 *infra*, the Report of the 1971 Advisory Council on Social Security, H.R. Doc. No. 92-80, 92d Cong., 1st Sess., recommends that 42 U.S.C. §402(g) remain a benefit for mothers only. The Council supplied three reasons for its conclusion that men need not be offered the choice offered women between caring personally for children and substantial employment outside the home: (1) very few men adopt the "dual role of worker and homemaker"; (2) the "customary and predominant role of the father is that of family breadwinner"; (3) men generally continue to work after their wives' deaths or incapacity. Report, *supra*, at 23. But see Railroad Retirement Commission Report (1972), *supra*, p. 15. The 1971 Advisory Council Report, though myopic on the basic point that the motherless child is the one ultimately disadvantaged by the denial of father's benefits, pre-dates this Court's decisions in *Reed* v. *Reed*, 404 U.S. 71 (1971), *Stanley* v. *Illinois*, 405 U.S. 645 (1972), and *Frontiero* v. *Richardson*, 411 U.S. 677 (1973). See also *Moritz* v. *Commissioner of Internal Revenue*, 469 F.2d 466 (10th Cir. 1972), *cert. denied*, 412 U.S. 906 (1973). At the time the Report issued, no legislatively-drawn gender line, however sharp, failed to survive constitutional challenge. See generally Davidson, Ginsburg & Kay, Sex-Based Discrimination 1-35 (1974).

Equally myopic, but impossible to explain in light of his own contemporaneous pronouncements, see pp. 41-44 *infra*,

is appellant's reference in this Court, as in the court below, to appellee's advanced degrees and his ability to command a substantial salary. See Jurisdictional Statement at 9 n. 9; Brief for the Appellant at 4; p. 4 & n. 1, *supra*. If Jason Paul's surviving parent were a woman, any suggestion that her academic degrees and intellectual capacity indicated she should choose remunerative employment over personal attention to her newborn child undoubtedly would be dismissed with alacrity. Moreover, the uncontrovertible fact is that appellee Stephen Wiesenfeld did choose to devote himself to the care of his child,[16] a choice no longer regarded as anomalous. See, *e.g.*, U.S. Dep't of Health, Education and Welfare, Higher Education Guidelines 13 (1972), issued pursuant to Executive Order 11,246, as amended:

> [L]eave for purposes relating to childcare should . . . be available to men and women on an equal basis.

Cf. *Danielson* v. *Board of Higher Education*, 358 F. Supp. 22 (S.D.N.Y. 1972); *Ackerman* v. *Board of Education of the City of New York*, 372 F. Supp. 274 (S.D.N.Y. 1974); Kitch, AFT Negotiates Change for College Women (AFT Item No. 619, 1974) (collective bargaining agreements establishing parental leaves for men or women with childcare responsibilities).

In sum, 42 U.S.C. §402(g)'s exclusion of coverage for a father who has in his care a child of the deceased insured female worker, the 1971 Advisory Council Report, and appellant's position in this litigation rest on the "arrogant assumption that merely because [the male breadwinner/female child tenderer] stereotypes are accurate for some

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[16] See note 2, *supra*.

individuals the [government] has a right to apply them to all individuals—and, indeed, to shape its official policy toward the end that [the stereotypes] shall continue to be accurate." Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U.L.Rev. 675, 725-26 (1971). Cf. Memorandum for the United States as Amicus Curiae at 8, *Cleveland Board of Education* v. *La Fleur* and *Cohen* v. *Chesterfield County School Board*, 414 U.S. 632 (1974), declaring in light of *Reed* v. *Reed*, *supra*, and *Frontiero* v. *Richardson*, *supra*, "It is now settled that the Equal Protection Clause of the Fourteenth Amendment (like the Due Process Clause of the Fifth) does not tolerate discrimination on the basis of sex."

C. *Exclusion of the spouse of a working woman from social insurance benefits accorded the spouse of a working man does not operate to remedy the effects of past economic discrimination against women.*

In *Kahn* v. *Shevin*, 416 U.S. 351 (1974), this Court upheld a gender line regarded as operating solely to remedy past economic discrimination encountered by women. Rectifying the effects of past discrimination against women (or historically disadvantaged minorities) is a laudable legislative objective. In assessing a gender classification for consistency with equal protection, however, a court must assure itself that the classification in fact works to alleviate past discrimination, and does not perpetuate practices responsible for that discrimination. The case at bar presents a classic example of the double-edged discrimination characteristic of laws that chivalrous gentlemen, sitting in all-male chambers, misconceive as a favor to the ladies. Significantly, when Congress genuinely determined to remedy overt discrimination against women in the economic sphere

by focusing on "firmly entrenched practices" inhospitable to their claims to equal opportunity and equal remuneration in the job market (cf. 416 U.S. at 353), it rejected the gender stereotype that underlies 42 U.S.C. §402(g). See, *e.g.*, 5 U.S.C. §7152 and kindred measures discussed at pp. 38-44 *infra*.

Perceiving the insidious impact on working women of the 42 U.S.C. §402(g) classification, the court below observed:

> [E]ven though Congress may have intended that this section rectify the effects of past and present discrimination against women, it operates to "heap on" additional economic disadvantages to women wage earners such as [the deceased wife]. [Citation omitted.] During her employment as a teacher, maximum social security payments were deducted from her salary. Yet, upon her tragic death, her surviving spouse and child receive less social security benefits than those of a male teacher who earned the same salary and made the same social security payments.

367 F. Supp. at 991; see *Frontiero* v. *Richardson*, 411 U.S. at 689 n. 22.

Nor can the discrimination operative here be willed away by reference to *Gruenwald* v. *Gardner*, 390 F.2d 591 (2d Cir.), *cert. denied*, 393 U.S. 982 (1968), followed in *Kohr* v. *Weinberger*, 378 F. Supp. 1299 (E.D. Pa. 1974).[17] *Gruenwald* involved a differential specifically tied to past discrimination *female wage earners* experienced in the labor mar-

[17] See Brief for the Appellant at 15 n. 10.

ket: depressed wages and early retirement policies applied by employers to women but not to men. Without the more favorable calculation formula, a formula applied to amounts in fact earned by women, past wage and job placement discrimination would have been aggravated by projection into the working woman's retirement years. Thus the *Gruenwald* differential operated to alleviate past discrimination against wage-earning women without disadvantaging any member of that class.[18] By contrast, exclusion of a female wage earner's family from benefits available to a male wage earner's family is not tied to wages paid to gainfully-employed women and does nothing to rectify past wage discrimination against them. Instead, congressional attention to the wives of insured wage earners is expressed in a scheme that impacts adversely on wives who are insured wage earners themselves. Far from assisting women toward equal status in economic endeavor, the classification fortifies the assumption, harmful to women, that labor for pay and attendant benefits is primarily the prerogative of men. See Matthews, Women Should Have Equal Rights With Men, 12 A.B.A.J. 117 (1926).

In sum, interpretation of *Kahn* v. *Shevin* to permit relegation of a female wage earner to second class status for family social insurance pay-out purposes (although she must pay-in on a first class basis) would collide head-on with *Reed* and *Frontiero* and would turn back the clock to the day when sharp lines between the sexes drawn by the

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[18] See *Kehr* v. *Weinberger*, *supra*, 378 F. Supp. at 1302 n. 5. Congress evidently regarded the *Gruenwald* differential as a transition measure. In 1972, it extended to men retiring at 62 the more favorable calculation formerly reserved to women. Act of October 30, 1972, §104, P.L. 92-603, 86 Stat. 1340.

legislature were routinely approved by the judiciary. See *Goesaert* v. *Cleary,* 335 U.S. 464, 466 (1948); Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U.L.Rev. 675 (1971). Congress itself and every federal agency concerned with genuine improvement of the position of women in the work force have identified as prime targets schemes of the kind challenged here. See pp. 38-44 *infra.* It would be bitterly ironic if a differential prohibited by federal command for the express purpose of eradicating sex discrimination in employment opportunity were permitted to stand in federal social insurance. See Note, Sex Classifications in the Social Security Benefit Structure, 49 Indiana L.J. 181, 193, 195 (1973). As the court below concluded affirmative legislation or executive action is permissible to undo past discrimination, but it would be perverse to characterize legislative action as "benign" or "affirmative" where, as here, "it discriminates against some of the group which it is designed to protect." 367 F. Supp. at 991.

Surely Paula Wiesenfeld would have found unfathomable the attempt to cast a compensatory cloak over the denial to her family of benefits available to the family of a male insured. Nor does appellant's rationale for discrimination begin to explain why the infant Jason Paul Wiesenfeld can have the personal care of a sole surviving parent only if that parent is female.

D. *Cost savings cannot justify an otherwise invidious discrimination.*

To the extent that appellant's prop for the challenged differential rests on cost savings, this Court's precedent rejects his position. *Shapiro* v. *Thompson,* 349 U.S. 618,

633 (1969); *Graham* v. *Richardson,* 403 U.S. 365 (1971); *New Jersey Welfare Rights Organization* v. *Cahill,* 411 U.S. 619 (1973); *United States Dep't of Agriculture* v. *Moreno,* 413 U.S. 528 (1973).

In *Shapiro* v. *Thompson, supra,* the Court confronted a determination by Congress and at least 40 states that public money should not be spent on welfare aid to new residents. Appellant's brief in that case cited the legislative history of the one-year residence requirement, and identified as the principal reason for the requirement the legislature's desire to limit welfare costs. Brief for Appellant at 8-10, *Shapiro* v. *Thompson, supra.* This Court's determination: the Constitution requires inclusion of the class deliberately excluded by the legislature. Accord, *Memorial Hospital* v. *Maricopa County,* 415 U.S. 250 (1974). Significantly, although the Court in *Shapiro* closely scrutinized the classification, it indicated that the one-year residence requirement was vulnerable even under the traditional, more lenient "rational basis" standard of equal protection review. 394 U.S. at 638.

In *Graham* v. *Richardson, supra,* legislative determinations excluding aliens from public assistance programs were overturned by the Court; public money had to be spent, despite the contrary command of the legislature, for persons entitled to equal protection. See also *Diaz* v. *Weinberger,* 361 F. Supp. 1 (S.D. Fla. 1973) (three-judge court), *prob. juris. noted,* 416 U.S. 980 (1974) (Social Security Act's exclusion from medicare eligibility of aliens with less than five years' residence held unconstitutional).

In *New Jersey Welfare Rights Organization* v. *Cahill, supra,* this Court struck down a limitation in New Jersey's

program for assistance to families of the working poor, thereby substantially enlarging the beneficiary class and the toll on the state fisc. That decision, summarily reversing 349 F. Supp. 491 (D.N.J. 1972) (three-judge court), bears a special relationship to the case at bar. Judge Fisher wrote the unanimous lower court opinions in both cases, and Judge Whipple served with him on both occasions. In both cases, the statutory exclusion ultimately disadvantaged a class of children. Mindful of this Court's firm instruction in *New Jersey Welfare Rights Organization,*[19] the court below in the instant case may have recalled Santayana's sage counsel. Moreover, the case at bar, unlike *New Jersey Welfare Rights Organization,* presented no question of federal deference due state policies on issues of local concern. Cf. *Davis* v. *Richardson,* 342 F. Supp. 588, 592 (D. Conn.) (three-judge court), *aff'd mem.,* 409 U.S. 1069 (1972). And plainly, leeway for Federal Social Security differentials (see Brief for the Appellant at 20) is no broader than leeway for state financed and operated public assistance programs. Finally, no "fundamental right" or "suspect" criterion was identified by this Court when it declared the exclusion impermissible in *New Jersey Welfare Rights Organization.* Accord, *United States Dep't of Agriculture* v. *Moreno,* 413 U.S. 528 (1973) (limiting food stamp program to households in which members are related to one another violates equal protection); *Vlandis* v.

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[19] See Transcript of June 20, 1973 hearing at 36, *Wiesenfeld* v. *Secretary of Health, Education and Welfare,* 367 F. Supp. 981 (D.N.J. 1973), following counsel for plaintiff's reference to this Court's decision in *New Jersey Welfare Rights Organization* v. *Cahill*:

> Judge Fisher: An unhappy memory, I wrote the opinion.
> Judge Whipple: Two unhappy memories, I was with him.

Kline, 412 U.S. 441 (1973) (in-state tuition); *Frontiero* v. *Richardson, supra; Demiragh* v. *DeVos*, 476 F.2d 403 (2d Cir. 1973) (welfare benefits); *Miller* v. *Laird*, 349 F. Supp. 1034 (D.D.C. 1972) (three-judge court) (medical care for service members' children born out of wedlock); *Chatman* v. *Barnes*, 357 F. Supp. 9 (N.D. Okla. 1973) (three-judge court) (state social insurance disability benefits); *Bowen* v. *Hackett*, 361 F. Supp. 854 (D.R.I. 1973) (state unemployment and disability insurance benefits); *Vaccarella* v. *Fusari*, 365 F. Supp. 1164 (D. Conn. 1973) (three-judge court) (augmented unemployment benefits for child in worker's care) (all decisions identifying unconstitutional exclusions from government benefits without labelling the right "fundamental" or the criterion "suspect").

In sum, fiscal economy is a commendable goal,[20] but it may not be achieved by invidious exclusions of persons guaranteed by the Constitution the equal protection of the laws.[21] It is invidious discrimination to provide less pro-

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[20] If the 1971 Advisory Council on Social Security was correct in its assumption that "very few" men would elect child care over full-time employment, see p. 21 *supra*, then the father's benefit cost will be minimal. Moreover, women's increasing preference for gainful employment outside the home suggests that the cost of according benefits to fathers would be offset by a reduction in women's claims for "child in care" benefits. Appellant's cost estimate for father's benefits (Appendix at 14) fails to note the potential offsetting impact of "child in care" benefit reductions attributable to 1) the steady growth in labor force participation by mothers, and 2) a declining birthrate.

[21] Appellant apparently agrees that the relative cost here at stake is not substantial, see Brief for the Appellant at 16-17 n. 11, but raises the specter of "closely analogous provisions." Brief for the Appellant at 22. That theme has been sounded before. See Brief for the Appellees at 20 n. 17, *Frontiero* v. *Richardson, supra;* Petition for Certiorari at 12, *Commissioner of Internal Revenue* v. *Moritz, supra;* cf. Brief for Appellant at 69-88, *Reed* v. *Reed, supra.* But discrimination that may exist in other statutes does not excuse discrimination against Paula, Stephen and Jason Paul

tection for the families of female wage earners than for the families of male wage earners, to deny to a widowed father the same opportunity to attend to the rearing of his child that is accorded the widowed mother, and to deny to a child whose mother has died the opportunity to be cared for personally by its father.

III.

Benefits distributed by government to gainfully-employed individuals and their families must be allocated with an even hand and without resort to classification based on gender per se.

A. *Decisions of this Court and lower federal courts establish that classification based on gender per se is impermissible in employment-related regulation.*

In *Frontiero* v. *Richardson,* 411 U.S. 677 (1973), this Court held that gender-based discrimination in the alloca-

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Wiesenfeld, any more than it excused discrimination against Sharron and Joseph Frontiero, Charles Moritz or Sally Reed.

As to comparative cost, and the necessity of financing "child in care" benefits for families such as the Wiesenfelds through "a rise in taxes or a decrease in benefits" (Brief for the Appellant at 22), cf. Board of Trustees of the Federal Old-Age and Survivors Insurance and Disability Insurance Trust Funds, Annual Report, H.R. Doc. 93-130, 93d Cong., 1st Sess. at 1, 7, 31-32 (1973): benefits paid from the old-age and survivors insurance trust fund in 1972 were $34,541,000,000; net contributions to the fund amounted to $35,711,000,000 in fiscal year 1972, an increase of 11.9% over the amount for the preceding fiscal year; the Social Security system's income for fiscal 1972 amounted to $43.2 billion, up by 11% over fiscal 1971, outgo totalled $40.2 billion, so that the funds increased by $3.1 billion in 1972 to a level of $43.8 billion on June 30, 1972. Significantly, the sole *actuarial* (not real) imbalance projected was attributed overwhelmingly to the disability insurance, not the survivors insurance, portion of the system. The Trustees recommended no change in contribution rates to adjust for the imbalance until "much more" is known about the change in disability rates.

tion of fringe benefits to members of the uniformed services violated the Constitution's guarantee of equal protection. A more extreme form of the same discriminatory pattern appears in the case at bar. Husbands qualified for benefits under the scheme struck down in *Frontiero* if they received more than half their support from their wives. The 42 U.S.C. §402(g) barrier, however, is insurmountable: under no circumstances are "child in care" benefits paid to the surviving spouse of a female insured individual. Cf. *Jimenez* v. *Weinberger*, 418 U.S. ——, 94 S. Ct. 2496 (1974) (declaring unconstitutional "blanket and conclusive exclusion" from Social Security benefits of subclass of children born out of wedlock). The invidiousness of the qualified exclusion in *Frontiero*, and the absolute exclusion here is evident: Paula Wiesenfeld's social insurance is worth less to her spouse and child than the insurance of an identically situated gainfully-employed male, just as Sharron Frontiero's efforts netted less for her family than the efforts of a male of similar rank and time in service. See Note, Sex Classifications in the Social Security Benefit Structure, 49 Indiana L.J. 181, 193, 195 (1973): "It would be highly anomalous for a court to decide that sex classifications of OASDHI meet either the rational relationship or the compelling state interest tests, when such classifications are not allowed in employment plans within the private sector."

Frontiero concerned, as this case does, woman's status and associated benefits when she participates in economic activity outside the home. As a worker, she has been assigned an inferior place, often with the aid of laws purportedly intended for her protection. As Justice Brennan commented in *Frontiero*:

> There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women not on a pedestal, but in a cage.

Frontiero v. *Richardson*, 411 U.S. at 684.

Spurred by a burgeoning feminist movement that has directed principal attention to employment-related inequities,[22] legislatures and courts are responding with increased sensitivity to generators of a separate and unequal place for women in the labor force. As a perceptive male jurist observed:

> One realizes with a shock what so many women now proclaim: Old accepted rules and customs often discriminate against women in ways that have long been taken for granted or have gone unnoticed.

Green v. *Waterford Board of Education*, 473 F.2d 629, 634 (2d Cir. 1973).[23] To assure meaningful equal protection of the laws to women, courts are beginning to undertake careful analysis of gender-based legislative classifications, and, particularly, gender lines drawn in an employment-related setting. See, *e.g.*, *Eslinger* v. *Thomas*, 476 F.2d 225 (4th Cir. 1973) (equal protection requires that young women be permitted to serve as pages in South Carolina Senate under the same terms and conditions as young men); *Bowen*

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[22] See generally Janeway, Man's World, Woman's Place: A Study in Social Mythology (1971).

[23] Cf. *Henslee* v. *Union Planters Nat'l Bank & Trust Co.*, 335 U.S. 595, at 600 (1949) (Frankfurter, J. dissenting) ("Wisdom too often never comes, and so one ought not to reject it merely because it comes late.").

v. *Hackett*, 361 F. Supp. 854 (D.R.I. 1973) (dependent child allowance must be furnished disabled and unemployed men and women on the same basis); *Smith* v. *City of East Cleveland*, 363 F. Supp. 1131 (N.D. Ohio 1973) (minimum height and weight requirements for municipal police officers discriminate invidiously on the basis of sex); *Andrews* v. *Drew Municipal Separate School District*, 371 F. Supp. 27 (N.D. Miss. 1973) (refusal to employ mothers of children born out of wedlock violates due process and discriminates on the basis of sex); *Stevenson* v. *Castles*, Civ. No. 7452 (D.C.Z. November 15, 1974) (free tuition for the children of male but not female employees of the Canal Zone Government and Panama Canal Company "discriminat[es] against women in violation of the equality guaranteed to them under the decisions of the Supreme Court [citing *Frontiero*] and [Title VII of] the Civil Rights Act [of 1964]").[24] As *Bowen* v. *Hackett*, *supra*, illustrates, it is hardly rational to condemn an employer's "compensation" scheme under the *Frontiero* principle, but declare that principle inoperative when the government distributes employment-related social insurance benefits.

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[24] For earlier indicators, see *Mengelkoch* v. *Industrial Welfare Comm'n*, 442 F.2d 1119 (9th Cir. 1971) (maximum hours laws applicable to women only presents substantial federal constitutional question); *Sail'er Inn, Inc.* v. *Kirby*, 5 Cal. 3d 1, 485 P.2d 529 (1971) (Federal and California Constitutions, as well as Title VII, bar exclusion of women from bartender occupation); *Paterson Tavern & Grill Owners Association* v. *Borough of Hawthorne*, 57 N.J. 180, 270 A.2d 628 (1970) (police power does not justify exclusion of women from bartender occupation); *Application of Shpritzer* v. *Lang*, 17 A.D.2d 285, 290, 234 N.Y.S.2d 285, 290 (1st Dep't 1962), *aff'd*, 13 N.Y.2d 744, 241 N.Y.S.2d 869 (1963) (exclusion of policewomen from promotional examination for sergeant would impermissibly deny constitutional rights solely because of gender); *Wilson* v. *Hacker*, 101 N.Y.S.2d 461 (Sup. Ct. 1950) (union's discrimination against female bartenders "must be condemned as a violation of the fundamental principles of American democracy").

B. Kahn v. Shevin *does not reestablish an equal protection standard under which legislative lines based on gender routinely attract judicial approval.*

Treating this Court's turning point decisions in *Reed* v. *Reed, supra,* and *Frontiero* v. *Richardson, supra,* as inconsequential, and largely disregarding reasoned application of those decisions in the lower courts,[25] appellant has

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[25] See in addition to the cases cited in the immediately preceding text, *Brenden* v. *Independent School District*, 477 F.2d 1292 (8th Cir. 1973) (young women may not be denied educational opportunities available in public high school to young men); *Moritz* v. *Commissioner of Internal Revenue*, 469 F.2d 466 (10th Cir. 1972), *cert. denied*, 412 U.S. 906 (1973) (when placed under the scrutiny required by *Reed*, income tax deduction classification premised primarily on sex lacks justification); *Lamb* v. *Brown*, 465 F.2d 18 (10th Cir. 1972) (16 (boys)/18 (girls) sex-age differential for juvenile offender treatment held unconstitutional); *Berkelman* v. *San Francisco Unified School District*, 501 F.2d 1264 (9th Cir. 1974), and *Bray* v. *Lee*, 337 F. Supp. 934 (D. Mass. 1972) (higher admission standards for females in college-preparatory public high schools violate equal protection); *Samuel* v. *University of Pittsburgh*, 375 F. Supp. 1119 (W.D.Pa. 1974) (application of derivative domicile rule to deny married women in-state tuition held unconstitutional); *In re Patricia A.*, 31 N.Y.2d 83, 335 N.Y.S.2d 33 (1972) (16 (boys)/18 (girls) sex-age differential for classification of "persons in need of supervision" declared unconstitutional); *State* v. *Chambers*, 63 N.J. 287, 307 A.2d 78 (1973) (differential sentencing laws for men and women violate equal protection); Getman, The Emerging Constitutional Principle of Sexual Equality, 1972 Supreme Court Review 157.

As to the catalogue in Brief for the Appellant at 10 n. 3, *Miskunas* v. *Union Carbide Corp.*, 399 F.2d 847 (7th Cir. 1968), *cert. denied*, 393 U.S. 1066 (1969), is no longer the law even in the jurisdiction there in question. See *Troue* v. *Marker*, 253 Ind. 284, 252 N.E.2d 800 (1969). See also *Gates* v. *Foley*, 247 So. 2d 40 (Fla. 1971), and, most recently, *Rodriguez* v. *Bethlehem Steel Corp.*, 43 U.S. Law Week 2097 (Calif. Supreme Court, August 21, 1974). Nor is it surprising that no denial of equal protection to men was found in *Williams* v. *McNair*, 401 U.S. 951 (1971), *aff'g mem.* 316 F. Supp. 134 (D.S.C. 1970) (three-judge court). Men had access to the state university's prestige colleges, including an all-male military and engineering college, but were denied admission to a school established to educate "white girls" in, *i.a.*, sewing dressmaking, needlework, cooking and other industrial arts "suitable

sought summary reversal of the decision below on the ground that *Kahn* v. *Shevin*, 416 U.S. 351 (1974), "is dispositive of the issue presented here." Jurisdictional Statement at 7, 11.[26] Some jurists appear to share appellant's appraisal of *Kahn* as a sharp about-face and a return to old ways. See *Edwards* v. *Schlesinger*, 377 F. Supp. 1091 (D.D.C.), *rev'd sub nom. Waldie* v. *Schlesinger*, Nos. 74-1636 and 74-1637 (D.C. Cir. November 20, 1974); *Kohr* v. *Weinberger*, 378 F. Supp. 1299, 1303-1304 (E.D. Pa. 1974) (dictum). But cf. Note, 88 Harv. L. Rev. 129 (1974).[27]

In *Edwards* v. *Schlesinger*, the district court concluded that *Kahn* established as the proper test for sex-based equal protection claims, the least demanding form of judicial scrutiny. Reversing the district court, the court of appeals evaluated the intensity of scrutiny issue differently. It

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to their sex." Appellant himself has concluded that the rule in *Robinson* v. *Board of Regents of Eastern Kentucky Univ.*, 475 F.2d 707 (6th Cir. 1973), *cert. denied*, 416 U.S. 982 (1974), is an impermissible gender-based classification. See Proposed 45 C.F.R. §86.31(b), 39 Fed. Reg. 22235 (Dep't of Health, Education and Welfare, Education Programs and Activities Benefiting from Federal Financial Assistance, Nondiscrimination on the Basis of Sex).

[26] As developed under headings I. and II., *supra*, it is impossible to comprehend how a rational mind could characterize as "benign" or "remedial" a law that treats Paula Wiesenfeld as a second class breadwinner, Stephen Wiesenfeld as an absentee parent, and Jason Paul as a child not entitled to the personal care of any parent.

[27] *Geduldig* v. *Aiello*, 417 U.S. ——, 94 S. Ct. 2485 (1974), also relied upon by Appellant, provides no guidance here. The Court there found that the distinct status of pregnancy, in the context of a state disability program, was not "discrimination based on gender as such." See *id.* at 2492 n. 20. Significantly, Brief for the Appellant at 21 refers to n. 21 of the *Aiello* opinion, but disregards the accompanying text: "There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not."

concluded that existing precedent, far from clarifying the appropriate review standard, reflected "widespread judicial uncertainty." And it characterized constitutional law in this area as "still evolving," "rapidly changing and variously interpreted." *Waldie* v. *Schlesinger*, Slip Opinion at 3-4, 5.

The uncertainty generated by *Kahn* with respect to judicial appraisal of gender-based classifications bears a marked resemblance to the uncertainty generated by *Labine* v. *Vincent*, 401 U.S. 532 (1971), with respect to birth status classifications. Indeed, commentators regarded *Labine* as a rapid retreat from, if not actually an overruling of, the turning point decision in *Levy* v. *Louisiana*, 391 U.S. 68 (1968). See Tenesco & Wallach, Book Review, 19 U.C.L.A. L. Rev. 845 (1972); Note, Inheritance by Illegitimates, 22 Case W. Res. L. Rev. 793 (1971). This Court's clarifying decisions, following soon after *Labine*, demonstrated the inaccuracy of forecasts that birth status classifications would not attract careful judicial analysis. See *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); *Richardson* v. *Davis* and *Richardson* v. *Griffin*, 409 U.S. 1069 (1972), *aff'g mem.* 342 F. Supp. 588 (D. Conn.) (three-judge court) and 346 F. Supp. 1226 (D. Md.) (three-judge court); *Gomez* v. *Perez*, 409 U.S. 535 (1973); *New Jersey Welfare Rights Organization* v. *Cahill*, 411 U.S. 619 (1973).

The *Kahn* decision is specifically and narrowly tied to the "large leeway" traditionally accorded states with respect to their systems of taxation, 416 U.S. at 355,[28] just as the *Labine* decision "reflected, in major part, the traditional deference to a State's prerogative to regulate the disposi-

[28] Cf. *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974) (indicating similar deference to local concerns).

tion at death of property within its borders." *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. at 170. Latitude for underinclusive classification is less broad when wholly federal and employment-related benefit programs are in question. See *Jimenez* v. *Weinberger*, 418 U.S. ——, 94 S. Ct. 2496 (1974), and *Weinberger* v. *Beaty*, —— U.S. ——, 94 S. Ct. 3190 (1974), *aff'g mem.* 478 F.2d 300 (5th Cir. 1973); *Davis* v. *Richardson*, 342 F.Supp. 588, 592 (D. Conn.) (three-judge court), *aff'd mem.*, 409 U.S. 1069 (1972); *Frontiero* v. *Richardson*, *supra*.

The instant case presents the Court with an opportunity to provide the guidance essential to clear analysis by lower courts, federal and state, of gender-based differentials commanded by law. The Court should terminate current speculation, confusion and divergent interpretation, as it did with respect to birth status classifications in *Weber* and *New Jersey Welfare Rights Organization;* it should clarify the dimensions of *Kahn* and reaffirm the vibrant principle implicit in the *Frontiero* judgment.[29]

[29] Overwhelming congressional approval of the equal rights amendment surely was not intended to deter dynamic judicial interpretation of the fifth and fourteenth amendments to bar law-sanctioned sex discrimination. During debate on the amendment, the principal proponent in the House, Representative Martha Griffiths, declared:

> There never was a time when decisions of the Supreme Court [under the fifth and fourteenth amendments] could not have done everything we ask today. 116 Cong. Rec. 28005 (1970).

Nonetheless, she urged her colleagues to provide a further constitutional guarantee of equality of rights and responsibilities between the sexes so that there would not be the slightest doubt that men and women stand as equals before the law. Cf. 2 J. Story, Commentaries on the Constitution of the United States §§1938, 1939 (5th ed. 1891). See also Citizens' Advisory Council on the Status of Women, A Memorandum on the Proposed Equal Rights Amendment to the United States Constitution 9-10 (1970), reprinted in Hearings on S.J. Res. 61 Before the Subcommittee on

C. *Federal laws governing private and public sector employment prohibit family fringe benefit differentials based on the sex of the gainfully-employed individual; these measures reflect the overriding concern of Congress to eliminate gender-based discrimination in the economic sphere.*

The discrimination ordered by 42 U.S.C. §402(g) is impossible to reconcile with the firm national commitment to eradicate per se differentials based on an individual's sex in all spheres of employment, private as well as public. Sex as a means to determine employment-related benefits has been declared unlawful by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e *et seq.;* the Equal Pay Act of 1963, as amended, 29 U.S.C. §206(d); Executive Order 11,246, as amended by Executive Order 11,375, 3 C.F.R. 169, 42 U.S.C. §2000e note; Title IX of the Education Amendments of 1972, 20 U.S.C. §§1681 *et seq.;* and statutes governing federal employment, *e.g.*, 5 U.S.C. §7152.

Sex Discrimination Guidelines issued by the Equal Employment Opportunity Commission pursuant to Title VII, 29 C.F.R. §§1604.1-1604.10,[30] provide:

> It shall be an unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees; . . . 29 C.F.R. §1604.9(d).

Constitutional Amendments of the Senate Committee on the Judiciary, 91st Cong., 2d Sess. at 381-82 (1970); President's Task Force on Women's Rights and Responsibilities, A Matter of Simple Justice 4 (April 1970); Equal Rights for Men and Women, S. Rep. 92-689, 92d Cong., 2d Sess. 10 (1972).

[30] See also (OFCC) Sex Discrimination Guidelines for Government Contractors, implementing Executive Order 11,375, 41 C.F.R. §60-20, particularly §60-20.3(c), (d).

The Guidelines, issued in 1972, are applicable to private as well as public employment; they explicitly proscribe differential treatment of men and women of the precise kind and quality here at issue. Moreover, they reflect consistent administrative and judicial interpretation prior to the time the Guidelines formally issued. For example, in 1969, the Equal Employment Opportunity Commission explained in a family fringe benefit ruling, Title VII "is intended to protect *individuals* from the penalizing effects of . . . presumptions based on the collective characteristics of a sexual group." EEOC Decisions, Case No. YNY9-034, CCH Emp. Practices Guide ¶6050 (June 16, 1969). For court confirmation of the underlying principle, see *Rosen* v. *Public Service Elec. & Gas Co.*, 477 F.2d 90 (3d Cir. 1973) (Title VII violated by pension arrangement allowing women to retire earlier on full pension); cf. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 436 (1971); *Rosenfeld* v. *Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971); *Diaz* v. *Pan American World Airways*, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971); *Bartmess* v. *Drewrys U.S.A., Inc.*, 444 F.2d 1186 (7th Cir. 1971).

Similar rulings have been made by the Wage and Hour Division of the Department of Labor, which administers the Equal Pay Act. For example, the Division has ruled that the Act is violated by insurance plans pursuant to which the employer pays family coverage insurance premiums for married male employees but pays such premiums for married female employees only if they qualify as heads of their families. W & H Opinion Letter No. 425, CCH Emp. Practices Guide ¶1208.52 (February 11, 1966).

With respect to federal employment, Congress enacted a catch-all in December 1971, to assure that national policy

governing the private sector applied with full vigor to the United States itself. 5 U.S.C. §7152 (P.L. 92-187, 85 Stat. 644) stipulates that all regulations granting benefits to government employees

> shall provide the same benefits for a married female employee and her spouse and children as are provided for a married male employee and his spouse and children . . . .

Further, 5 U.S.C. §7152 provides that

> any provision of law providing a benefit to a male Federal employee or to his spouse or family shall be deemed to provide the same benefit to a female Federal employee or to her spouse or family.

The section applies not only to other provisions of Title 5, but also to "any other provision of law granting benefits to employees." Only members of the uniformed services fall outside this encompassing benefit equalization provision.[31] Other measures similar in design deal with veterans' benefits and preferences (5 U.S.C. §2108, as amended in December 1971 by P.L. 92-187, 85 Stat. 644; 38 U.S.C. §102(b), as amended in October 1972, by P.L. 92-540, 86 Stat. 1074), cost of living allowances to spouses of federal employees (5 U.S.C. §5924, as amended in December 1971 by P.L. 92-187, 85 Stat. 644), and federal civil service survivors' annuities (5 U.S.C. §8341, as amended in January 1971 by

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[31] See also 5 U.S.C. §7151 (declaring it U.S. policy to insure equal employment opportunity without discrimination because of, *inter alia*, sex); 5 U.S.C. §7154 (prohibiting discrimination in federal employment because of, *inter alia*, sex); 5 U.S.C. §8902(f) (prohibiting exclusion from federal employee health benefit plans because of, *inter alia*, sex).

P.L. 91-658, 84 Stat. 1961). The latter amendment, according widowers the same automatic qualification as widows, was accompanied by a House Committee Report explaining:

> In the Committee's judgment, the present provision is discriminatory in that it runs counter to the facts of current-day living, whereby the woman's earnings are significant in supporting the family and maintaining its standard of living. Accordingly, the bill removes the dependency requirements applicable to surviving widowers of female employees, thus according them the same treatment accorded widows of deceased male employees.

H.R. Rep. No. 91-1469, 91st Cong., 2d Sess., 1970 U.S. Code Cong. & Admin. News, Vol. III, 5931, 5934. See also 37 U.S.C. §401, as amended on July 9, 1973 (P.L. 93-64, 87 Stat. 148), equalizing fringe benefits for male and female members of the uniformed services in accordance with this Court's May 14, 1973 decision in *Frontiero* v. *Richardson, supra.*[32]

Finally, appellant himself has placed in sharp focus the utter irrationality of the congressional direction he is obliged to support in the case at bar. Carrying out a flatly contradictory congressional command of more recent vintage, Title IX of the Education Amendments of 1972, appellant has declared that recipients of federal funds may not withhold from the spouse of a female wage earner *any* benefit provided to the spouse of a male wage earner. In

[32] Although the effective date of the statute is July 1, 1973, the Comptroller General has declared the *Frontiero* decision fully retroactive. 53 Comp. Gen. —— (B178979, August 31, 1973).

proposed rules implementing Title IX, issued June 20, 1974 (Proposed 45 C.F.R. §§86.46-86.48, 39 Fed. Reg. 22237), appellant has stipulated:

§86.46

. . . .

(b) *Prohibitions.* A recipient shall not:

(1) discriminate on the basis of sex with regard to making fringe benefits . . . available to spouses . . . of employees differently upon the basis of the employee's sex;

. . . .

(3) . . . participate in a pension or retirement plan which . . . discriminates in benefits on the basis of sex.

§86.47

(a) *General.* A recipient shall not apply any policy or take any employment action:

. . . .

(2) which is based on whether an employee . . . is the head of household or principal wage earner in such employee's . . . family unit.

. . . .

§86.48

. . . .

(b) *Benefits.* A recipient which provides any . . . benefit to members of one sex pursuant to a State or local law or other requirement shall provide the same . . . benefit to members of the other sex.

See also U.S. Dep't of Health, Education and Welfare, Higher Education Guidelines pursuant to Executive Order 11,246, October 1, 1972, at 13: "It is also unlawful for an employer to make benefits available to the wives and families of male employees where the same benefits are not available to the husbands and families of female employees." The Guidelines instruct that the employer "must not presume that a married man is 'head of household' or 'principal wage earner'."

To illustrate appellant's position in this litigation:[33]

> W, a wage-earning married woman, dies in 1974. E, her employer, denies augmented family benefits to her spouse and child, but grants such benefits automatically to the spouse and child of a similarly situated male employee.

According to appellant, a practice of that kind, when engaged in by an employer, causes and continues relegation

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[33] Brief for the Appellant at 21-22 constructs a "theory" that surely is not appellee's. Women's receipt of "54% of Social Security payments" is hardly "evidence of discrimination against male workers." Quite the contrary. That figure is not far from women's representation in the nation's population. Moreover, women tend to outlive men, hence their receipts might be expected to exceed 54%. Cf. Hoskins & Bixby, Social Security Research Report No. 42, Women and Social Security: Law and Policy in Five Countries 82 (1973) (noting the preponderance of women among the special age-72 beneficiaries). Of course, a man who enjoys long life would receive benefits based on his individual situation and would not be denied benefits on the basis of a gross gender classification of the kind made in 42 U.S.C. §402(g). Also reflected in the percentages cited by appellant is the weighted benefit formula used to determine Social Security payments, *i.e.*, the highest percentage of benefits is paid for the first $110 of monthly earnings. 42 U.S.C. §415. This formula benefits *individuals* with low incomes, many of whom are women, but it does not discriminate against men. Again, the criterion is not gender as it is in 42 U.S.C. §402(g), but the insured individual's life situation, specifically, his or her earnings.

of women to an inferior position in the work force. But the very same differential, when utilized by defendant pursuant to 42 U.S.C. §402(g), is alleged to "ameliorate the inferior economic status of women." Brief for the Appellant at 14-18. The inconsistency and illogic are inescapable. If E's practice causes and continues a pattern that helps perpetuate women's inferior status in the work force, so does appellant's.

The sole candid explanation for appellant's inconsistent analyses is that the congressional orders he must follow point in opposite directions. That is unquestionably true. But the conflict in those orders is unavoidable. As underscored by every federal effort to counter practices that deny women equal rights and opportunities in the work force, including appellant's own published guidelines, the 42 U.S.C. §402(g) gender-based differential is at odds with the concept of nondiscrimination and contrary to any reasoned definition of affirmative action.

IV.

Upon determining that the gender line drawn by 42 U.S.C. §402(g) violates the fifth amendment, the Court, consistent with the dominant congressional purpose, should declare the benefit equally applicable to mothers and fathers.

When a federal statute denies equal protection by establishing an unconstitutional classification, the judiciary must determine "whether it more nearly accords with Congress' wishes to eliminate its policy altogether or extend it in order to render what Congress plainly did intend, constitutional." *Welsh* v. *United States*, 398 U.S. 333, 355-56 (1970) (Harlan, J. concurring); *see Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535, 542-43 (1942); *Iowa-Des Moines Nat'l Bank* v. *Bennett*, 284 U.S. 239, 247 (1931). The nature of the necessary inquiry was succinctly described by the Supreme Court of New Jersey:

> . . . [T]he judiciary cannot enlarge the reach of a statute, for that is solely a legislative function. The proposition is obvious enough, and it is equally true that a court may not restrict the scope of a statute. But neither proposition is involved when the question is whether a statute must fall because of a constitutional defect. Rather the question is whether the Legislature would want the statute to survive, and that inquiry cannot turn simply upon whether the statute, if adjusted to the constitutional demand, will cover more or less than its terms purport to cover. Although cases may be found which seem to speak in such mechanical terms, we think the sounder course is to consider what is involved and to decide from the sense of the situation

whether the Legislature would want the statute to succumb.

Schmoll v. *Creecy*, 54 N.J. 194, 202, 254 A.2d 525, 529-30 (1969).

Similar reasoning is implicit in this Court's judgment in *Frontiero* v. *Richardson*, 411 U.S. 677 (1973). The *Frontiero* judgment reflects a determination that extension of benefits to spouses of female members of the uniformed services would better serve the congressional purpose than would judicial destruction of the benefit scheme.

The same approach, preferring salvage to demolition, is indicated in diverse decisions of this Court involving state as well as federal laws. *E.g.*, *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974) (state health care); *United States Dep't of Agriculture* v. *Moreno*, 413 U.S. 528 (1973) (federal food stamps); *New Jersey Welfare Rights Organization* v. *Cahill*, 411 U.S. 619 (1973) (state aid to families of the working poor); *Graham* v. *Richardson*, 403 U.S. 365 (1971) (state public assistance); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) (state and District of Columbia public assistance). In all of these cases, the extensions necessary to bring the statutes in line with constitutional limitations required substantial expenditures of public funds. In two of them, *United States Dep't of Agriculture* v. *Moreno* and *New Jersey Welfare Rights Organization* v. *Cahill*, the remedy was not tied to any "fundamental right" or "suspect criterion" determination. Similarly, in *Shapiro* v. *Thompson*, although the Court closely scrutinized the classification, it indicated that the same result would follow even under the traditional, more lenient "ra-

tional basis" standard of equal protection review. 394 U.S. at 638.

The remedial issue was treated explicitly in *Moritz* v. *Commissioner of Internal Revenue*, 469 F.2d 466 (10th Cir. 1972), *cert. denied*, 412 U.S. 906 (1973), a decision of particular relevance to the instant case, for it involved a tax benefit available to never married women with incapacitated dependents, but not to similarly situated never married men. After determining that the gender line was inconsistent with the fifth amendment, the Tenth Circuit further declared:

> [Next], we must determine the effect of the invalidity of provisions denying the deduction to men who have never married. Where a court is compelled to hold such a statutory discrimination invalid, it may consider whether to treat the provisions containing the discriminatory underinclusion as generally invalid or whether to extend the coverage of the statute. 469 F.2d at 470.

The Tenth Circuit concluded that extension of the tax benefit was "logical and proper," and accordingly declared the deduction in question available to never married men. Significantly, the remedial route in *Moritz* was noted by this Court when it pursued the same course in *Frontiero*, 411 U.S. at 691 n. 25.

Following this Court's guidance, lower courts have directed extensions kin to the one ordered by the court below in the instant case. See, *e.g.*, *Demiragh* v. *DeVos*, 476 F.2d 403, 405 (2d Cir. 1973) (welfare benefits); *Bowen* v. *Hackett*, 361 F. Supp. 854 (D.R.I. 1973) (unemployment and disability insurance benefits); *Diaz* v. *Weinberger*, 361

F. Supp. 1 (S.D. Fla. 1973) (three-judge court), *prob. juris. noted*, 416 U.S. 980 (1964) (medicare benefits); *Chatman* v. *Barnes*, 357 F. Supp. 9 (N.D. Okla. 1973) (three-judge court) (disability benefits); *Miller* v. *Laird*, 349 F. Supp. 1034 (D.D.C. 1972) (three-judge court) (military medical benefits); *Vaccarella* v. *Fusari*, 365 F. Supp. 1164 (D. Conn. 1973) (three-judge court) (augmented unemployment benefits for child in worker's care). Cf. *Hays* v. *Potlatch Forests, Inc.*, 465 F.2d 1081 (8th Cir. 1972) (consistent with Title VII's employment discrimination prohibition, premium overtime law by its terms applicable to women only must be applied by employer to men as well as women); *In re Estate of Legatos*, 1 Cal. App. 3d 657, 81 Cal. Rptr. 910 (1969) (property exempt from tax when devised by wife to husband must also be exempt when devised by husband to wife).

Nor is the salvage approach a remedy of recent vintage. For decades, courts have recognized that, while the legislature ultimately may decide to revise or even abandon a statutory benefit, in the meantime, preservation rather than destruction of the legislation may be prescribed. See *Yale & Towne Mfg. Co.* v. *Travis*, 262 F. 576 (S.D.N.Y. 1919), *aff'd*, 252 U.S. 60 (1920) (tax exemptions granted by statute only to state citizens extended to citizens of other states); *Burrow* v. *Kapfhammer*, 284 Ky. 753, 145 S.W.2d 1067 (1940), noted in 54 Harv. L. Rev. 1078 (1941) (plaintiff added to exempt class to cure unconstitutional exclusion); *Quong Ham Wah Co.* v. *Industrial Accident Comm'n*, 183 Cal. 26, 192 P. 1021 (1920), *appeal dismissed*, 255 U.S. 445 (1921) (workmen's compensation benefits extended to nonresidents to cure constitutional infirmity); Note, 55 Harv. L. Rev. 1030, 1034-36 (1942).

The legislative history of 42 U.S.C. §402(g) supplies no cogent reason for the omission from insurance benefits of a male widowed parent caring for the child of a deceased wage earner. See pp. 16-23 *supra*. The scant history that exists supports the conclusion that the exclusion of fathers was the product of oversight, not deliberation. In any event, this much is clear: nothing in the text of 42 U.S.C. §402(g) or its legislative history indicates that unequal treatment of men and women is a considered part of the congressional plan for protection of families of deceased insured individuals. Unquestionably, the dominant congressional purpose was to provide for the families of deceased wage earners. Withdrawing the benefit from mothers would conflict with this primary statutory objective. Under the circumstances, extension is the only suitable remedy.

In sum, the legislative history of Social Security, the express remedial preference of Congress in all of its recent measures eliminating gender-based differentials, and well-established judicial precedent signal the direction for a court concerned with preservation rather than destruction of legislative policy.

CONCLUSION

For the reasons stated above, the decision of the district court declaring unconstitutional and enjoining the enforcement of 42 U.S.C. §402(g) insofar as it discriminates on the basis of gender should be affirmed.

Respectfully submitted,

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Attorneys for Appellee gratefully acknowledge the assistance provided in preparation of this brief by Mary Elizabeth Freeman, second year student at Columbia Law School.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1892

CASPAR W. WEINBERGER, Secretary of Health, Education and Welfare,

Appellant,

—v—

STEPHEN CHARLES WIESENFELD, Individually and on behalf of all persons similarly situated,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL RIGHTS

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On Appeal From The United States District Court For The District of New Jersey

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BRIEF FOR AMICUS CURIAE
CENTER FOR CONSTITUTIONAL RIGHTS

STATEMENT OF INTEREST

The Center For Constitutional Rights is a non-profit, tax exempt legal and educational corporation dedicated to ad-

vancing and protecting the rights and liberties guaranteed by the Bill of Rights to the United States Constitution. Born of the efforts of lawyers in the Civil Rights Movement in the South, the Center has since that time included in its legal efforts other groups which have been the subject of systematic and pervasive discrimination.

Since 1969 the Center has devoted substantial energy to the struggle of women to effectuate their constitutional rights to equal protection of the laws and has taken leadership in the legal movement for equal rights. Amicus is thus concerned with the maintenance and expansion of constitutional protection afforded women.

ARGUMENT

Introduction

The instant case is of historic

importance to the development of constitutional protection of equal rights for women. After this Court's landmark decisions in Reed v. Reed, 404 U.S. 71 (1971) and Frontiero v. Richardson, 411 U.S. 677 (1973), which struck down sex-based laws on the basis of a close examination of the stereotypes embodied in those laws, this Court last term suggested a return to traditional sex-stereotyped assumptions when it upheld, in Kahn v. Shevin, 416 U.S. 391 (1974), a sex-based statute on the ground that it remedied past discrimination encountered by women. Now, on the basis of Kahn, appellant contends that Section 402(g), 42 U.S.C., is unconstitutional, despite its sex-stereotyped origin and impact, on the theory that the statute is also remedial.

Amicus contends that this Court must soundly reject any extension of Kahn and

give clear direction to the lower courts to scrutinize remedial rationales closely.

I. SECTION 402(g) EMBODIES AND PERPETUATES HISTORIC SEX-BASED DISCRIMINATION IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Acceptance of appellant's rationale of remedial treatment in the instant case would signal a reversion to the sex-stereotyped paternalism repudiated in Reed and Frontiero.

Historically, special treatment of women based on either biological or economic inferiority has always meant unequal treatment and has "heaped on" additional disadvantages. Frontiero v. Richardson, 411 U.S. at 689, n. 22. Early protective labor laws, which were routinely approved by male legislators and judges as beneficial to women, operated in fact, to exclude women from the labor market or to justify lower pay scales for

equal work. Brown, et al., "The Equal Rights Amendment: A Constitutional Basis for Equal Rights of Women," 80 Yale L.J. 871, 927 (1971); Babcock, et al., Sex Discrimination and the Law: Causes and Remedies, (1975), p. 251-3. Based on gross stereotypes of women's proper role as mother and childrearer, see e.g. Muller v. Oregon, 208 U.S. 412 (1908), these laws perpetuated a heritage of "romantic paternalism which, in practical effect, put women not on a pedestal but in a cage", Frontiero v. Richardson, supra, at 679, and ensured women's second-class status in employment and society. See Johnston and Knapp, "Sex Discrimination by Law: A Study in Judicial Perspective," 46 N.Y.U. L.Rev. 675 (1971). Lest this Court continue the "romantic paternalism" of the past, the remedial rationale asserted herein must be rejected.

As a first matter, appellant's contention that §402(g) is designed to ameliorate women's inferior economic position is highly questionable. Review of the statute's legislative history fails to demonstrate any such remedial intent. See Brief for the Appellee, pp. 16-17, Brief for the Appellant, pp. 12-14. Congress was concerned with the plight of children who survived deceased workers and assumed that only women were dependent and would stay at home to rear them. The purpose of the statute was not to remedy sex discrimination but to assist worker's beneficiaries. Appellant's attempt in this case to tack a new "remedial" rationale onto an old statute, which originated in and reinforces the traditional sex-based assumptions of the past, is cause for extreme suspicion. Compare Cleveland Board of Education v. LaFleur, 414 U.S. 632 n.9

(1974).

Indeed, the assumption underlying §402(g), that woman is home-centered and man is work-centered, are precisely those repudiated by this Court in Reed and Frontiero. §402(g) ranks all women as secondary breadwinners, whose employment in the labor market is less valuable than the employment of men, and assigns them the role of childrearer. It ranks all men as primary breadwinners and denies them the opportunity to personally rear their children if and when their children have no other parent to care for them.

The impact of this provision is the further perpetuation of sex-based discrimination. The statute operates to restrict marital choices as to work and the care of children by assigning and encouraging the performance of those functions on a traditional sex-stereotyped basis.

By denying women the possibility of providing for their families in the event of their death, it operates as a continuing disincentive to women to work and strengthens the assumption that only men's work is valuable and important. Conversely, the statute embodies a continuing disincentive to men to care for their children both while their spouse is alive and in event of her death. Thus the statute reinforces, not remedies, women's second-class status in employment.

The kind of denigration of women's labor outside the home, represented by §402(g), severely hinders the breakdown of sex-based social rules which is central to women's economic advancement and full equality. Like protective labor laws, which reinforced and rationalized exclusion of women from the job market, the statute at issue herein perpetuates the "sharp

line between the sexes" which this Court declared must be firmly put to rest. Frontiero v. Richardson, supra.

Finally, appellant's effort to analogize this case to Kahn v. Shevin is misplaced. While amicus would contend that this Court's decision in Kahn embodied the sex-stereotyped assumptions of Muller,*/ Kahn involved a state taxing statute to which this Court normally accords "large leeway". Id. at 392. Moreover, the perpetuation of a dependency stereotype which has the impact of further disadvantaging women in employment and restricting marital choices was not at issue in Kahn. The tax statute involved there gave women a one-time gift which had no effect on role

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*/ The citation of Muller in Kahn, 416 U.S. at 392, n. 10, reveals the close linkage between the remedial rationales of the present and the protective cloaks of the past.

allocations within the family. Like Frontiero, the statute here incorporates assumptions concerning lack of value given to women's work outside the home and relies on the effects of past sex discrimination "as a justification for heaping on additional economic disadvantages." Frontiero v. Richardson, 411 U.S. at 689, n. 22 cited in Kahn v. Shevin, 416 U.S. at 392, n. 8.*/

Consistent with this Courts recognition in Frontiero of the double-edged discrimination in special treatment for women, the sex-line of §402(g) must be rejected.

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*/ However, the discrimination herein is even more invidious than in Frontiero since the sex-based barrier is unsurmountable. It would be anomalous indeed if sex-based preferences justified on the basis of administrative convenience were to receive stricter treatment by this Court than flat sex-based exclusions.

II. REMEDIAL RATIONALIZATIONS OF SEX-BASED DISCRIMINATIONS MERIT CLOSE JUDICIAL SCRUTINY.

This Court's refusal to tolerate sex-stereotyped assumptions and effects under the "fair and substantial relationship" test, applied in Reed and Frontiero, dictates affirmance of the district Court's judgment. It is accordingly technically unnecessary for the Court to reach the question of whether to accord women "suspect" status under the Equal Protection Clause. Nonetheless, amicus submits that this case demonstrates the importance of this Court's applying the traditional vehicle of "suspect classification" to sex discriminatory laws.

The opinion of the district court illustrates that this Court's articulation of an intermediate test applicable to sex-based classifications in Reed v. Reed does not provide clear enough instruction to

the lower courts to scrutinize closely the sex-stereotypical assumptions and impact of sex-based laws. Although the district court erroneously rejected the argument that Reed and Frontiero establish a new, strengthened equal protection test, it did acknowledge that it was obliged under Reed to "analyze statutory classifications based upon sex in more pragmatic terms of this everyday modern world rather than in the stereotyped generalizations of the Victorian Age." Wiesenfeld v. Secretary of Health, Education & Welfare, 367 F.Supp. 981, 988 (D.N.J., 1973). Nevertheless, after detailing the specific discriminatory effects of §402(g), Id. 989, the Court loosely accepted the remedial rationale and sustained the statute under Reed on the stereotypical assumption that "women and families who have lost the 'male head of household'" are categoric-

ally more needy.*/ Id. at 990. The district court believed that it had to treat the remedial rationale as "suspect" and apply strict scrutiny in order to give determinative effect to the fact that beneficience here is but a guise for the perpetuation of discriminatory disadvantages for women.

While the district court can be corrected for misapplication of the Reed test, amicus believes that more decisive action by this Court is called for, particularly in light of the intervening decision in Kahn v. Shevin,**/ supra. Given the tenacity

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*/ See Brief for the Appellees, p. 18, n. 12.

** Amicus believes that Kahn suffers from the same uncritical acceptance of the "remedial" rationale as did the lower court's opinion, herein. Kahn, however, is one of very few situations where a chivalric discriminatory advantage is not effectively a double-edged sword. The possibility of unwarranted extensions of Kahn demands that this Court clarify that remedial rationales merit close judicial scrutiny.

of "romantic paternalism", it follows that modern day progeny of the traditional protective rationales, like the remedial argument here, will be proferred in support of maintaining sex-discriminatory lines. The danger is thus unique and acute in this area that the practical impact of discrimination will continue to be concealed by the cloak of beneficience.

Accordingly, unequivocal direction to the lower courts to closely scrutinize remedial rationales is necessary. The traditional vehicle for such direction is a declaration by this Court that sex-based classifications are "suspect". Amicus urges the Court to seize the opportunity presented by this case to adopt the opinion of the plurality in Frontiero and accord women the equal protection of strict judicial scrutiny.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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Dated: New York, N.Y.
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Attorneys gratefully acknowledge the assistance provided in preparation of this brief by Martha Geores, second year student at New York University Law School.

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* WIESENFELD

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

No. 73-1892. Argued January 20, 1975—Decided March 19, 1975

The gender-based distinction mandated by the provisions of the Social Security Act, 42 U. S. C. § 402 (g), that grant survivors' benefits based on the earnings of a deceased husband and father covered by the Act both to his widow and to the couple's minor children in her care, but that grant benefits based on the earnings of a covered deceased wife and mother only to the minor children and not to the widower, violates the right to equal protection secured by the Due Process Clause of the Fifth Amendment, since it unjustifiably discriminates against women wage earners required to pay social security taxes by affording them less protection for their survivors than is provided for men wage earners. Pp. 6–17.

(a) The distinction is based on an "archaic and overbroad" generalization not tolerated under the Constitution, namely, that male workers' earnings are vital to their families' support, while female workers' earnings do not significantly contribute to families' support. *Frontiero* v. *Richardson*, 411 U. S. 677. Pp. 6–7.

(b) That social security benefits are "noncontractual" and do not compensate for work performed or necessarily correlate with contributions to the program, cannot sanction the solely gender-based differential protection for covered employees. Since the benefits depend significantly upon a covered employee's participation in the work force, and since only covered employees and not others are required to pay taxes toward the system, benefits must be distributed according to classifications that do not differentiate among covered employees solely on the basis of sex. Pp. 10–11.

Syllabus

(c) Since, as is apparent from the statutory scheme itself and from § 402 (g)'s legislative history, § 402 (g)'s purpose in providing benefits to young widows with children was not, as the Government contends, to provide an income to women who, because of economic discrimination, were unable to provide for themselves, but to permit women to elect not to work and to devote themselves to care of children (and thus was not premised upon any special disadvantage of women), it cannot serve to justify a gender-based distinction diminishing the protection afforded women who do work. Pp. 11–16.

367 F. Supp. 981, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. POWELL, J., filed a concurring opinion in which BURGER, C. J., joined. REHNQUIST, J., filed an opinion concurring in the result. DOUGLAS, J., took no part in the consideration or decision of the case.

SUPREME COURT OF THE UNITED STATES

No. 73-1892

Caspar W. Weinberger, Secretary of Health, Education, and Welfare, Appellant, *v.* Stephen Charles Wiesenfeld, Etc.

On Appeal from the United States District Court for the District of New Jersey.

[March 19, 1975]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Social Security Act benefits based on the earnings of a deceased husband and father covered by the Act are payable, with some limitations, both to the widow and to the couple's minor children in her care. 42 U. S. C. § 402 (g).[1] Such benefits are payable on the basis of the

[1] Section 402 (g) is headed "Mother's insurance benefit." It provides in pertinent part:

"(1) The widow and every surviving divorced mother (as defined in section 416 (d) of this title) of an individual who died a fully or currently insured individual, if such widow or surviving divorced mother—

"(A) is not married,

"(B) is not entitled to a widow's insurance benefit,

"(C) is not entitled to old-age insurance benefits, or is entitled to old-age insurance benefits each of which is less than three-fourths of the primary insurance amount of such individual,

"(D) has filed application for mother's insurance benefits, or was entitled to wife's insurance benefits on the basis of the wages and

earnings of a deceased wife and mother covered by the Act, however, only to the minor children and not to the widower.[1] The question in this case is whether this gender-based distinction violates the Due Process Clause of the Fifth Amendment.[2]

A three-judge District Court for the District of New Jersey held that the different treatment of men and women mandated by § 402 (g) unjustifiably discriminated against women wage-earners by affording them less protection for their survivors than is provided to male employees. 367 F. Supp. 981, 991 (N. J. 1973). We noted probable jurisdiction, — U. S. — (1974). We affirm.

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self-employment income of such individual for the month preceding the month in which he died,

"(E) at the time of filing such application has in her care a child of such individual entitled to a child's insurance benefit . . . shall . . . be entitled to a mother's insurance benefit for each month, beginning with the first month after August 1950 in which she becomes so entitled to such insurance benefits and ending with the month preceding the first month in which any of the following occurs: no child of such deceased individual is entitled to a child's insurance benefit, such widow or surviving divorced mother becomes entitled to an old-age insurance benefit equal to or exceeding three-fourths of the primary insurance amount of such deceased individual, she becomes entitled to a widow's insurance benefit, she remarries, or she dies . . . ."

The terms "fully" and "currently" insured are defined in 42 U. S. C. § 414. See n. 3, *infra*.

[2] "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" *Schneider* v. *Rusk*, 377 U. S. 163, 168 (1964); see also *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954). This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment. See, *e. g.*, *Schlesinger* v. *Ballard*, — U. S. — (1975); *Jiminez* v. *Weinberger*, 417 U. S. 628, 637 (1974); *Frontiero* v. *Richardson*, 411 U. S. 677 (1973).

I

Stephen C. Wiesenfeld and Paula Polatschek were married on November 5, 1970. Paula, who worked as a teacher for five years before her marriage, continued teaching after her marriage. Each year she worked maximum social security contributions were deducted from her salary.[3] Paula's earnings were the couple's principal source of support during the marriage, being substantially larger than those of appellee.[4]

On June 5, 1972, Paula died in childbirth. Appellee was left with the sole responsibility for the care of their infant son, Jason Paul. Shortly after his wife's death, Stephen Wiesenfeld applied at the Social Security office in New Brunswick, New Jersey, for social security survivors' benefits for himself and his son. He did obtain benefits for his son under 42 U. S. C. § 402 (d),[5] and re-

[3] Thus, Paula Wiesenfeld was "currently insured" when she died, see n. 1, *supra*, because she had "not less than six quarters of coverage during the thirteen-quarter period ending with (1) the quarter in which [she] died." 42 U. S. C. § 414 (b).

[4] In 1970, Paula earned $9,808, and Stephen earned $3,100 as a self-employed consultant; in 1971, Paula earned $10,686 and Stephen $2,188; in 1972, Paula earned $6,836.35 before she died, and Stephen $2,475 for the entire year. Stephen completed his education before the marriage.

[5] Section 402 (d) is headed child's insurance benefits and provides in pertinent part as follows:

"Every child . . . of an individual who dies a fully or currently insured individual, if such child—

"(A) has filed application for child's insurance benefits,

"(B) at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time student and had not attained the age of 22, or (ii) is under a disability (as defined in section 423 (d) of this title) which began before he attained the age of 22, and

"(C) was dependent upon such individual—

. . . .

"(ii) if such individual has died, at the time of such death . . . shall be entitled to a child's insurance benefit for each month, beginning

ceived for Jason $206.90 per month until September 1972, and $248.30 per month thereafter. However, appellee was told that he was not eligible for benefits for himself, because § 402 (g) benefits were available only to women.[6] If he had been a woman, he would have received the same amount as his son as long as he was not working, see 42 U. S. C. §§ 402 (d)(2), 402 (g)(2), and, if working, that

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with the first month after August 1950 in which such child becomes so entitled to such insurance benefits and ending with the month preceding whichever of the following first occurs—

"(D) the month in which such child dies or marries,

"(E) the month in which such child attains the age of 18, but only if he (i) is not under a disability (as so defined) at the time he attains such age, and (ii) is not a full-time student during any part of such month."

Thus, child's insurance benefits are now available without regard to whether the worker upon whose earnings benefits are based is the mother or father. This was not always the case. Originally, a child could receive benefits based on his mother's earnings only if he had not been living with his father and was being supported solely by his mother. Social Security Amendments of August 10, 1939, c. 666, § 202 (c), 53 Stat. 1364. This provision was amended in 1950 to provide automatic entitlement to otherwise eligible children of women workers who were currently insured, see nn. 1 and 3, *supra*, when they died, but retaining dependency qualifications if the mother's covered employment was not recent. Social Security Amendments of August 28, 1950, c. 809 § 101 (a), 64 Stat. 684. In 1967, children of women workers were made eligible for children's benefit on exactly the same criteria applied to children of male workers. Social Security Amendments of 1967, Pub. L. No. 90-248, § 151, 81 Stat. 860.

[6] Appellee said in an affidavit that he was told orally at the Social Security office that he could not file an application for benefits on his own behalf. The Government does not dispute that the request for benefits was orally made and orally denied. Tr. of Oral Arg. before District Court, June 20, 1973, at 45; 367 F. Supp., at 985 n. 5.

amount reduced by $1.00 for every $2.00 earned annually above $2 400. 42 U. S. C. § 403 (b) & (f).[7]

Appellee filed this suit in February, 1973,[8] claiming jurisdiction under 28 U. S. C. § 1331, on behalf of himself and of all widowers similarly situated.[9] He sought a declaration that § 402 (g) is unconstitutional to the extent that men and women are treated differently, an injunction restraining appellant from denying benefits under 42 U. S. C. § 402 (g) solely on the basis of sex, and payment of past benefits commencing with June, 1972, the month of the original application. Cross motions for

[7] Stephen Wiesenfeld was employed until October 1972. However, since he earned $2,475 for the entire year 1972, n. 4, *supra*, he apparently would have been eligible for benefits were he a woman from June 1972 until he obtained employment again on February 5, 1973, at a salary of $1,500 per month. This lawsuit was filed on February 24, 1973. On September 14, 1973, appellee was dismissed from his position, so that he was unemployed and again eligible for benefits, but for the gender-based distinction, when the lower court opinion issued on December 11, 1973. Appellee, in an affidavit filed in September 1973, ascribed his employment difficulties in large part to the difficulties of childcare. In particular, he noted that he had "encountered severe difficulty in obtaining the services of a suitable housekeeper, to whom I could conscientiously entrust Jason's care. I have employed four housekeepers in the past year. . . ."

[8] Appellee did not seek administrative review of the denial under 42 U. S. C. § 405 (b). However, the Government stipulated that any administrative appeal would have been futile, since § 402 (g) on its face precludes granting benefits to men. Tr. of Oral Arg. before District Court, June 20, 1973, at 16–17. Nor does the Government now claim that § 405 (h), which provides that "no findings of fact or decision of the Secretary shall be reviewed . . . except as herein provided," (see 42 U. S. C. § 405 (g)) is a bar to this action. See *Public Utilities Comm'n* v. *United States*, 355 U. S. 534, 539–540 (1958); *Richardson* v. *Morris*, 409 U. S. 464 (1973) (per curiam); *Griffin* v. *Richardson*, 346 F. Supp. 1226, aff'd, 409 U. S. 1069 (1972).

[9] The three-judge court declined to permit the action to proceed as a class action. 367 F. Supp., at 986–987. No appeal has been taken from this ruling.

summary judgment were filed. After the three-judge court determined that it had jurisdiction,[10] it granted summary judgment in favor of appellee, and issued an order giving appellee the relief he sought.

II

The gender-based distinction made by § 402 (g) is indistinguishable from that invalidated in *Frontiero* v. *Richardson*, 411 U. S. 677 (1973). *Frontiero* involved statutes which provided the wife of a male serviceman with dependents' benefits but not the husband of a servicewoman unless she proved that she supplied more

[10] The court recognized that the jurisdictional amount of $10,000 under 28 U. S. C. § 1331 is established as long as it does not "appear to a legal certainty" that the matter in controversy does not total $10,000, *St Paul Mercury & Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, 289 (1938), and therefore that where an injunction commanding future payments is sought, there is no need to await accrual of $10,000 in back benefits to bring suit. However, it was troubled by the fact that appellee was employed on the day suit was filed, see n. 7, *supra*, and thus would not have been entitled to benefits on that day. It held that there was nonetheless jurisdiction because of the futility of dismissing the suit when the plaintiff could refile immediately and establish jurisdiction, since he was unemployed by the time of decision. We believe that there was jurisdiction in any event on the day the suit was filed. Benefits under § 402 (g) could be available to appellee, if he prevailed, until his infant child became 18, see 42 U. S. C. §§ 402 (d), 402 (g), 402 (s) (1). At the then-prevailing benefit rates, appellee would reach $10,000 in benefits if he collected full benefits for a little more than three years, see, p. 4, *supra*. Social security benefits are to some degree in the nature of insurance, providing present security and peace of mind from fear of future lack of earnings. Also, unlike disability benefits, see 42 U. S. C. § 423, these survivors' benefits do not depend upon ability to earn but only upon actual earnings. Thus, they give a potential recipient a choice between staying home to care for the child and working. This opportunity for choice, and the potential right to as much as $53,600 worth of benefits ($2,980 per year times 18 years), certainly has a present value of $10,000, whether or not the claimant was eligible for benefits on the day he filed suit.

than one-half of her husband's support. The Court held that the statutory scheme violated the right to equal protection secured by the Fifth Amendment. *Schlesinger* v. *Ballard*, — U. S. — (1975), explained: "In . . . *Frontiero* the challenged [classification] based on sex [was] premised on overbroad generalizations that could not be tolerated under the Constitution. . . . [T]he assumption . . . was that female spouses of servicemen would normally be dependent upon their husbands, while male spouses of servicewomen would not." — U. S., at —. A virtually identical "archaic and overbroad" generalization, *id.*, at —, "not . . . tolerated under the Constitution" underlies the distinction drawn by § 402 (g), namely, that male workers' earnings are vital to the support of their families, while the earnings of female wage-earners do not significantly contribute to their families' support.[11]

Section 402 (g) was added to the Social Security Act in 1939 as one of a large number of amendments designed to "afford more adequate protection to the family as a unit." H. R. Rep. No. 728, 76th Cong., 1st Sess., 7 (1939). Monthly benefits were provided to wives, children, widows, orphans, and surviving dependent parents of covered workers. *Ibid.* However, children of covered women workers were eligible for survivors' benefits only in limited circumstances, see n. 5, *supra*, and no benefits whatever were made available to husbands or widowers on the basis of their wives' covered employment.[12]

[11] See the observations in *Frontiero*, 411 U. S., at 689, n. 23, that in view of the large percentage of married women working (41.5% in 1971), the presumption of complete dependency of wives upon husbands has little relationship to present reality. In the same vein, *Taylor* v. *Louisiana*, — U. S. — (1975), observed that current statistics bely "the presumed role in the home" of contemporary women. — U. S., at —, n. 17.

[12] Changes have been made in these provisions. For example, benefits are now available to husbands and aged widowers of covered

Underlying the 1939 scheme was the principle that "under a social-insurance plan, the primary purpose is to pay benefits in accordance with the *probable needs* of beneficiaries rather than to make payments to the estate of a deceased person regardless of whether or not he leaves dependents." H. R. Rep. No. 728, *supra*, at 7. (Emphasis supplied.) It was felt that "[t]he payment of these survivorship benefits and supplements for the wife of an annuitant are . . . in keeping with the principle of social insurance. . . ." *Ibid.* Thus, the framers of the Act legislated on the "then generally accepted presumption that a man is responsible for the support of his wife and child." Hoskins & Bixby, Women and Social Security—Law and Policy in Five Countries, Social Security Administration Research Report No. 42, 77 (1973).[13]

Obviously, the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support.

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workers if they can show that more than one-half of their support has been provided by their wives. 42 U. S. C. § 402 (e); § 402 (f). See also n. 5, *supra*. See generally Note, Sex Classifications in the Social Security Benefit Structure, 49 Ind. L. J. 181 (1973).

[13] See, *e. g.*, H. R. Rep. No. 728, 76th Cong., 1st Sess., 36 (1959): "[A] child is not usually financially dependent upon his mother"; 84 Cong. Rec. 6896 (1939) (Remarks of Rep. Cooper): "[W]e now have under the provisions of this bill a program on a family basis, and we will take care of these people who will need this assistance because of the loss of the *father* or the *husband* and the loss of the pay and wages that *he* has been bringing into the family." (Emphasis supplied.) See also Report of the Committee on Social Insurance and Taxes, The President's Commission on the Status of Women, 29 (1963): "It was decided at the time that if the determination of dependency were based on generally valid presumptions, there would be no need in most situations for detailed investigations of family financial relationships. Since the husband traditionally was the wage earner in the family and the wife was the homemaker, benefits were provided for wives, widows, and children on the basis of presumed dependency on the husband. . . ."

See *Kahn* v. *Shevin*, 416 U. S. 351, 354 n. 7 (1974). But such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support.

Section 402 (g) clearly operates, as did the statutes invalidated by our judgment in *Frontiero*, to deprive women of protection for their families which men receive as a result of their employment. Indeed, the classification here is in some ways more pernicious. First, it was open to the servicewoman under the statutes invalidated in *Frontiero* to prove that her husband was in fact dependent upon her. Here, Stephen Wiesenfeld was not given the opportunity to show, as may well have been the case, that he was dependent upon his wife for his support, or that, had his wife lived, she would have remained at work while he took over care of the child. Second, in this case social security taxes were deducted from Paula's salary during the years in which she worked. Thus, she not only failed to receive for her family the same protection which a similarly situated male worker would have received, but she also was deprived of a portion of her own earnings in order to contribute to the fund out of which benefits would be paid to others. Since the Constitution forbids the gender-based differentiation premised upon assumptions as to dependency made in the statutes before us in *Frontiero*, the Constitution also forbids the gender-based differentiation that results in the efforts of women workers required to pay social security taxes producing less protection for their families than is produced by the efforts of men.

III

The Government seeks to avoid this conclusion with two related arguments. First, it claims that because social security benefits are not compensation for work

done, Congress is not obliged to provide a covered female employee with the same benefits as it provides to a male. Second, it contends that § 402 (g) was "reasonably designed to offset the adverse economic situation of women by providing a widow with financial assistance to supplement or substitute for her own efforts in the marketplace." Brief for Appellants, 14, and therefore does not contravene the equal protection guarantee.

A

Appellant relies for the first proposition primarily on *Flemming* v. *Nestor*, 363 U. S. 603 (1960). We held in *Flemming* that the interest of a covered employee in future social security benefits is "noncontractual," because "each worker's benefits, though flowing from the contributions he made to the national economy while actively employed, are not dependent upon the degree to which he was called upon to support the system by taxation." 363 U. S., at 609–610. The Government apparently contends that since benefits derived from the social security program do not correlate necessarily with contributions made to the program, a covered employee has no right whatever to be treated equally with other employees as regards the benefits which flow from his or her employment.

We do not see how the fact that social security benefits are "noncontractual" can sanction differential protection for covered employees which is solely gender-based. From the outset, social security old age, disability, and survivors' (OASDI) benefits have been "afforded as a matter of right, related to past participation in the productive processes of the country." Final Report of the Advisory Council on Social Security 17 (1938). It is true that social security benefits are not necessarily related directly to tax contributions, since the OASDI system is structured to provide benefits in part according

to presumed need.[14] For this reason, *Flemming* held that the position of a covered employee "cannot be soundly analogized to that of the holder of an annuity, whose right to benefits is bottomed on contractual payments." 363 U. S., at 610. But the fact remains that the statutory right to benefits *is* directly related to years worked and amount earned by a covered employee,[15] and not to the need of the beneficiaries directly. Since OASDI benefits do depend significantly upon the participation in the work force of a covered employee, and since only covered employees and not others are required to pay taxes toward the system, benefits must be distributed according to classifications which do not without sufficient justification differentiate among covered employees solely on the basis of sex.

B

The Government seeks to characterize the classification here as one reasonably designed to compensate women beneficiaries as a group for the economic difficulties which still confront women who seek to support themselves and

[14] See p. 8, *supra*. There has been a continuing tension in the OASDI system between two goals: individual equity, which accords benefits commensurate with the contributions made to the system, and social adequacy, which assures to all contributors and their families a tolerable standard of living. See Pechman, Aaron & Taussig, Social Security: Perspectives for Reform 33–34 (1968); Report of the Social Security Board, H. R. Doc. No. 110, 76th Cong., 1st Sess., 5 (1939). Rather than abandoning either goal, Congress has tried to meet both, by assuring that the protection afforded each contributor is at least that which his contributions could purchase on the private market. See H. R. Rep. No. 728, 76th Cong., 1st Sess., 13–14 (1939); H. R. Rep. No. 1300, 81st Cong., 1st Sess., 2 (1949).

[15] See 42 U. S. C. §§ 414, 415 for the correlation between years worked, amount earned, and the "Primary Insurance Amount," which is the amount received by fully insured employees upon reaching retirement age. Benefits under 42 U. S. C. § 402 (g) are 75% of the Primary Insurance Amount of the covered employee.

their families. The Court held in *Kahn* v. *Shevin*, *supra*, 416 U. S., at 355, that a statute "reasonably designed to further a state policy of cushioning the financial impact of spousal loss upon that sex for which that loss imposes a disproportionately heavy burden" can survive an equal protection attack. See also *Schlesinger* v. *Ballard*, *supra*. But the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme.[16] Here, it is apparent both from the statutory scheme itself and from the legislative history of § 402 (g) that Congress' purpose in providing benefits to young widows with children was not to provide an income to women who were, because of economic discrimination, unable to provide for themselves. Rather, § 402 (g), linked as it is directly to responsibility for minor children, was intended to permit women to elect not to work and to devote themselves to the care of children. Since this purpose in no way is premised upon any special disadvantages of women, it cannot serve to justify a gender-based distinction which diminishes the protection afforded to women who do work.

That the purpose behind § 402 (g) is to provide children deprived of one parent with the opportunity for the personal attention of the other could not be more clear in the legislative history. The Advisory Council on Social Security, which developed the 1939 amendments, said explicitly that "[s]uch benefits [§ 402 (g)] are in-

[16] This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation. See *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972); *Jiminez* v. *Weinberger*, 417 U. S. 628, 634 (1974); *U. S. Department of Agriculture* v. *Moreno*, 413 U. S. 528, 536–537 (1973).

tended as supplements to the orphans' benefits *with the purpose of enabling the widow to remain at home and care for the children.*" Final Report of the Advisory Council on Social Security 31 (1938). (Emphasis supplied.) In 1971, a new Advisory Council, considering amendments to eliminate the various gender-based distinctions in the OASDI structure, reiterated this understanding: "Present law provides benefits for the mother of young . . . children . . . if she chooses to stay home and care for the children instead of working. In the Council's judgment, it is desirable to allow a woman who is left with the children the *choice* of whether to stay at home to care for the children or to work." Advisory Council on Social Security, Reports on the Old-Age, Survivors, and Disability Insurance and Medicare Programs 30 (1971) (hereinafter 1971 Reports). (Emphasis supplied.)

Indeed, consideration was given in 1939 to extending benefits to all widows regardless of whether or not there were children. The proposal was rejected, apparently because it was felt that young widows without children can be expected to work, while middle-aged widows "are likely to have more savings than young widows, and many of them have children who are grown and able to help them." Report of the Social Security Board, H. R. Doc. No. 110, 76th Cong., 1st Sess., 7–8 (1939). See also Final Report of the Advisory Council on Social Security 31 (1938); Hearings on the Social Security Act Amendments of 1939, 76th Cong., 1st Sess., 61, 1217, 2169–2170; H. R. Rep. No. 728, 76th Cong., 1st Sess., 36–37 (1939). Thus, Congress decided *not* to provide benefits to all widows even though it was recognized that some of them would have serious problems in the job market. Instead, it provided benefits only to those women who had responsibility for minor children, because it believed that they should not be required to work.

The whole structure of survivors' benefits conforms to this articulated purpose. Widows without children obtain no benefits on the basis of their husband's earnings until they reach age 60 or, in certain instances of disability, age 50. 42 U. S. C. § 402 (e)(1) and (5). Further, benefits under § 402 (g) cease when all children of a beneficiary are no longer eligible for children's benefits.[17] If Congress were concerned with providing women with benefits because of economic discrimination, it would be entirely irrational to except those women who had spent many years at home rearing children, since those women are most likely to be without the skills required to succeed in the job market. See Walker, Sex Discrimination in Government Benefit Programs, 23 Hastings L. J. 277, 278–279 (1971); Hearings, *supra*, at 61 (remarks of Dr. Altemeyer, Chairman, Social Security Board); Report of the Committee on Social Insurance and Taxes, The President's Commission on the Status of Women, 31–32 (1963). Similarly, the Act now provides benefits to a surviving divorced wife who is the parent of a covered employee's child, regardless of how long she was married to the deceased or of whether she or the child was dependent upon the employee for support. 42 U. S. C. §§ 402 (g), 416 (d)(3). Yet, a divorced wife who is not the mother of a child entitled to children's benefits is eligible for

[17] In certain cases, mother's benefits under § 402 (g) cease although some children are still eligible for children's benefits under § 402 (d). In particular, children continue to be eligible for benefits while full-time students until age 22 and, in some instances, for a few months thereafter. 42 U. S. C. § 402 (d)(1)(F) and (d)(7). Yet, benefits to the mother under § 402 (g) cease if all children have reached 18 and are not disabled. 42 U. S. C. § 402 (s)(1). This distinction also sustains our conclusion that § 402 (g) was intended only to provide an opportunity for children to receive the personal attention of one parent, since mother's benefits are linked to children's benefits only so long as it is realistic to think that the children might need their parent at home.

benefits only if she meets other eligibility requirements *and* was married to the covered employee for 20 years. 42 U. S. C. §§ 402 (b) and (e), 416 (d).[18] Once again, this distinction among women is explicable only because Congress was not concerned in § 402 (g) with the employment problems of women generally but with the principle that children of covered employees are entitled to the personal attention of the surviving parent if that parent chooses not to work.

Given the purpose of enabling the surviving parent to remain at home to care for a child, the gender-based distinction of § 402 (g) is entirely irrational. The classification discriminates among surviving children solely on the basis of the sex of the surviving parent. Even in the typical family hypothesized by the Act, in which the husband is supporting the family and the mother is caring for the children, this result makes no sense. The fact that a man is working while there is a wife at home does not mean that he would, or should be required to, continue to work if his wife dies. It is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female. And a father, no less than a mother, has a constitutionally protected

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[18] Originally, no divorced wives were entitled to benefits on the basis of their former husbands' earnings. The provision for surviving divorced wives who are the mothers of children entitled to survivors' benefits was added in 1950. Social Security Amendments of 1950, c. 809, § 101 (a), 64 Stat. 483. It was not until 1965 that benefits were provided for aged divorced wives and widows, premised upon a 20-year marriage. Social Security Amendments of 1965, Pub. L. No. 89–97, § 308, 79 Stat. 375. Both these groups of women were required to prove dependency upon the former husband. The proof of dependency requirements were eliminated in 1972. Social Security Amendments of 1972, Pub. L. No. 92–603, § 114. This separate development of benefits for divorced women with children and those without reinforces the conclusion that the presence of children is the raison d'etre of § 402 (g).

right to the "companionship, care, custody, and management" of "the children he has sired and raised, [which] undeniably warrants deference and, absent a powerful countervailing interest, protection." *Stanley* v. *Illinois*, 405 U. S. 645, 651 (1972). Further, to the extent that women who work when they have sole responsibility for children encounter special problems, it would seem that men with sole responsibility for children will encounter the same child-care related problems.[19] Stephen Wiesenfeld, for example, found that providing adequate care for his infant son impeded his ability to work, see n. 7, *supra*.

Finally, to the extent that Congress legislated on the presumption that women as a group would choose to forego work to care for children while men would not,[20]

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[19] The Commission on Railroad Retirement, commenting upon a similar provision of the railroad retirement system, significantly stated: "Statistically speaking there are, of course, significant differences by sex in the roles played in our society. For example, far more women than men are primarily involved in raising minor children. But if the society's aim is to further a socially desirable purpose, e. g., better care for growing children, it should tailor any subsidy directly to the end desired, not indirectly and unequally by helping widows with dependent children and ignoring widowers in the same plight. In this example, it is the economic and *functional* capability of the surviving breadwinner to care for children which counts; the sex of the surviving parent is incidental." Commission on Railroad Retirement, Railroad Retirement System—Its Coming Crisis, H. R. Doc. No. 72–350, 92d Cong., 2d Sess., 378 (1972). (Emphasis supplied.)

[20] Precisely this view was expressed by the 1971 Advisory Council on Social Security, whose recommendations upon which gender-based distinctions in the OASDI system to retain and which to discard were followed in the 1972 Social Security Amendments: "The Council believes that it is unnecessary to offer the same choice [whether to work or care for surviving children] to a man. Even though many more married women work today than in the past, so that they are both workers and homemakers, very few men adopt such

the statutory structure, independent of the gender-based classification, would deny or reduce benefits to those men who conform to the presumed norm and are not hampered by their child-care responsibilities. Benefits under § 402 (g) decrease with increased earnings, see p. 4–5, *supra*. According to the Government, "the bulk of male workers would receive no benefits in any event," Brief for Appellant, at 17, because they earn too much. Thus, the gender-based distinction is gratuitous; without it, the statutory scheme would only provide benefits to those men who are in fact similarly situated to the women the statute aids.

Since the gender-based classification of § 402 (g) cannot be explained as an attempt to provide for the special problems of women, it is indistinguishable from the classification held invalid in *Frontiero*. Like the statutes there, "[b]y providing dissimilar treatment for men and women who are . . . similarly situated, the challenged section violates the [Due Process] Clause." *Reed* v. *Reed*, 404 U. S. 71, 77 (1971).

Affirmed.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

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a dual role: the customary and predominant role of the father is not that of a homemaker but rather that of the family breadwinner. A man generally continues to work to support himself and his children after the death or disability of his wife. The Council therefore does not recommend that benefits be provided for a young father who has children in his care." 1971 Reports, *supra*, at 30.

SUPREME COURT OF THE UNITED STATES

No. 73–1892

Caspar W. Weinberger, Secretary of Health, Education, and Welfare, Appellant, *v.* Stephen Charles Wiesenfeld, Etc.	On Appeal from the United States District Court for the District of New Jersey.

[March 19, 1975]

MR. JUSTICE REHNQUIST, concurring in the result.

Part III B of the Court's opinion contains a thorough examination of the legislative history and statutory context which define the role and purpose of § 402 (g). I believe the Court's examination convincingly demonstrates that the only purpose of § 402 (g) is to make it possible for children of deceased contributing workers to have the personal care and attention of a surviving parent, should that parent desire to remain in the home with the child. Moreover, the Court's opinion establishes that the Government's proffered legislative purpose is so totally at odds with the context and history of § 402 (g) that it cannot serve as a basis for judging whether the statutory distinction between men and women rationally serves a valid legislative objective.

This being the case, I see no necessity for reaching the issue of whether the statute's purported discrimination against female workers violates the Fifth Amendment as applied in *Frontiero* v. *Richardson*, 411 U. S. 677 (1973). I would simply conclude, as does the Court in its Part III B, that the restriction of § 402 (g) benefits to surviving mothers does not rationally serve any valid legis-

lative purpose, including that for which § 402 (g) was obviously designed. This is so because it is irrational to distinguish between mothers and fathers when the sole question is whether a child of a deceased contributing worker should have the opportunity to receive the full-time attention of the only parent remaining to it. To my mind, that should be the end of the matter. I therefore concur in the result.

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MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE joins, concurring.

I concur in the judgment and generally in the opinion of the Court. But I would identify the impermissible discrimination effected by § 402 (g) somewhat more narrowly than the Court does. Social Security is designed, certainly in this context, for the protection of the *family*. Although it lacks the contractual attributes of insurance or an annuity, *Flemming* v. *Nestor*, 363 U. S. 603 (1960), it is a contributory system and millions of wage earners depend on it to provide basic protection for their families in the event of death or disability.

Many women are the principal wage earners for their families, and they participate in the Social Security system on exactly the same basis as men. When the mother is a principal wage earner, the family may suffer as great an economic deprivation upon her death as would occur upon the death of a father wage earner. It is immaterial whether the surviving parent elects to assume primary child care responsibility rather than work, or whether other arrangements are made for child care. The statu-

tory scheme provides benefits both to a surviving mother who remains at home and to one who works at low wages. A surviving father may have the same need for benefits as a surviving mother.* The statutory scheme therefore impermissibly discriminates against a female wage earner because it provides her family less protection than it provides that of a male wage earner, even though the family needs may be identical. I find no legitimate governmental interest that supports this gender classification.

*I attach less significance to the view emphasized by the Court that a purpose of the statute is to enable the surviving parent to remain at home to care for a child. In light of the long experience to the contrary, one may doubt that fathers generally will forgo work and remain at home to care for children to the same extent that mothers may make this choice. Under the current statutory program, however, the payment of benefits is not conditioned on the surviving parent's decision to remain at home.